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Contributing Editor.

We are glad to be able to state that Henry A. Chaney, Esq., of Detroit, Mich., and James Hayward, Esq., of the St. Louis bar will render regular assistance in the editorial work of the JOURNAL this year. The head-notes to the case of *The M. K. Hawley and to Marks v. Cowles*, printed in this issue were prepared by Mr. Chaney.

WRITS OF ERROR FROM SUPREME COURT OF UNITED STATES TO STATE COURT.—Questions of practice in the Supreme Court of the United States are considered to be of such importance as already to deserve attention at the hands of a law journal of general circulation. Elsewhere, in the case of *Atherton v. Fowler*, we publish another decision of that court, expounding its practice in sending out writs of error to the state courts. We venture to say that no branch of procedure is less understood by the American bar, as the constant dismissals of writs of error in that court will show.

MINOR v. HAPPERSETT.—We hope it will not be for a moment supposed that, because we give place to a review of the decision of the Supreme Court of the United States in this case, we have any doubt as to the correctness of the result reached. We print the review, because one of the objects which we have in view in publishing a law journal is a free and ingenuous criticism of judicial decisions, no matter by what court pronounced; and it would be cowardice to refuse an opportunity for a candid discussion of a judicial decision, because such a discussion might be unpopular. The writer of the review elsewhere printed is undoubtedly sincere in his views as presented, and his processes of reasoning appear, for the most part, technically correct according to the rules of logic. But at the threshold of the argument he is met by an overwhelming fact, which may be best stated by premising that in expounding written statutes and constitutional ordinances the sole object is to reach the intention of the law making body. Now our reviewer does not pretend, nor does any other man of sense suppose, that the Congress in proposing, or the state legislatures in ratifying, the Fourteenth and Fifteenth Amendments, had the faintest idea of disturbing the existing *status* in regard to woman suffrage. Here, then, is a fact which overwhelms and silences all argument; the national and state legislatures in establishing these amendments intended no such result as our reviewer predicates of them. If we were to venture any criticism upon the opinion of the learned Chief Justice in *Minor v. Happersett*, it would be that he consumed unnecessary time and space in discussing a question as to which there was no possible room for a judicial doubt.

We do not wish to be understood as intimating any views, *pro* or *con*, as to the justice or expediency of enfranchising women. Those are questions to be addressed to the political and not to the judicial departments of our various governments; and with the discussion of them a law journal has properly nothing to do.

The Stability of Judge-made Law.

I have nowhere seen in any law periodical a review of the 67th volume of *Illinois Reports*. This book is conspicuous among modern reports as showing how a court of last resort in a great state, can at one term solemnly decide the same point two different ways. The case of *The Peoria, Pekin & Jacksonville R. R. Co. v. Siltman*, reported at page 72, shows that one Siltman had his wagon and team struck by an engine of the Company at a public crossing. He brought suit and charged as negligence a

failure to ring a bell or sound a whistle eighty rods before the train reached the crossing, and to continue the warning until the crossing was reached. There was a verdict and judgment for Siltman, and the company appealed. Siltman's counsel asked the court below to instruct the jury as follows: "On the part of the plaintiff, the jury are instructed that, if they believe, from the evidence, that a bell was not rung or whistle sounded, at a distance of eighty rods from the crossing, and kept ringing or whistling till the crossing was reached, and the plaintiff was lulled into security by the reason of such neglect on the part of defendants, then the plaintiff would have a right to recover, even though he were guilty of slight negligence."

In commenting on this instruction the supreme court, delivering its opinion through Mr. Justice McAllister, say: "The second instruction omits to submit the question to the jury, whether the plaintiff sustained the damages he sought to recover, by reason of the neglect of the defendant's servants to ring the bell or sound the whistle, or keep the same ringing or sounding until the highway was reached, but declares defendant's liability, if plaintiff was lulled into security by reason of such neglect. This is an evasion of the statute, and was calculated to mislead the jury." And the cause was, of course, reversed.

The case of *The Chicago and Alton R. R. Co. v. Elmore*, reported at page 176, and decided at the same term with Siltman's case, shows that Elmore had his wagon and team struck by an engine of the company at a public crossing. He also brought suit, and, like Siltman, charged as negligence a failure to ring a bell or sound a whistle eighty rods before the train reached the crossing, and to continue the warning until crossing was reached. There was a verdict and judgment for Elmore, and the company appealed. Elmore's counsel asked the court below to give to the jury an instruction which was *word for word* the one which the court below gave in Siltman's case, and which is set out above. The supreme court in commenting on this instruction in Elmore's case, delivering its opinion through Mr. Justice Thornton, say: "The eighth instruction is almost in the language of this court in the case of *C. B. & A. R. R. Co. v. Triplett*, 38 Ill. 483. The statute requires timely warning to be given of the approach of all trains to the crossings of public highways. The signal must be so prolonged as to give the traveler full and ample notice of the coming train. When he approaches a crossing and no signal has been given, the necessary conclusion in his mind is, that no train is near, and he is not so careful or watchful as if the required signal had been heard. Notwithstanding the neglect of the company, the traveler must exercise caution and prudence, but his care would necessarily be less when he had no warning of danger; and any injury to him, under such circumstances, must naturally be attributed, in a great degree, to the negligence of the company." And the judgment in this case was affirmed.

We learn from Siltman's case that the instruction mentioned was "an evasion of the statute and calculated to mislead the jury," but in Elmore's case, we are told that the same instruction is "almost in the language of this court in the *C. B. & A. R. R. Co. v. Triplett*, 38 Ill. 143," and is entirely unexceptionable, and the facts in these two cases seem to have been entirely similar.

Apert from a certain humorous phase which this circumstance presents, it is calculated to give rise to very serious considerations. The law-making power under our system, instead of being exercised by the legislative authority, is delegated in an enormous degree to the courts. It is safe to say that at least two-thirds of the law enacted is to be found announced for the first time in the reports of decis-

ions. When a court of last resort, therefore, disregards any settled rule to favor a hard case, or in a fit of sentimentality, does what is sometimes called "substantial justice," at the cost of precedent, it works an injury incomparably greater than would have been done by regarding the rule or following the precedent. There is no case so hard as to justify the shaking of public confidence in the stability of law: If the decision of a court went no further than to settle a single dispute, "substantial justice" might be done, and hard cases indulged without stint; but when it is considered that the decision becomes at once a part of a vast system of law, the most scrupulous care must be taken not to graft upon that system any inconsistency or anomaly. The determination of the particular dispute is of infinitely less consequence than the effect the decision is probably to have upon multitudes of other disputes. The chief evil to be guarded against is the constant tendency to exercise a "sound discretion," and thus to render uncertain and unstable that which every interest of society demands shall be certain and stable. It was some such tendency doubtless which led the Supreme Court of Illinois in the two decisions quoted, to exercise the discretion in two different directions; and, in view of these cases, it may safely be said that courts are no exception to that political rule which requires that official discretion in all free states should be restricted as much as possible. W.

Bankruptcy and the Statute of Limitations.

In the CENTRAL LAW JOURNAL of January 7th, I find some comments upon a single remark contained in an article of mine, of November 26th, headed *Bankruptcy and the Statute of Limitations*. Incidentally, and perhaps somewhat hastily, I spoke of "the extreme uncertainty, not to say lamentable confusion which attends the construction of the bankrupt law." It was far from my purpose to undervalue or disparage the many eminent judges by whom that law is administered. I designed only to suggest the desirableness of some change in the system, which might promote a greater uniformity of decision, and gradually establish the bankrupt law, a law that promises or threatens to remain a branch of our jurisprudence for an indefinite period, upon a more solid basis than it is now likely to attain. Perhaps I can not better illustrate the idea which I intend to convey with reference to the special subject of my former article, than by quoting a few lines from the critique upon that article. The writer says: "It is true, that of the five cases cited in that article, three exclude from proof claims passed by the statute, and two allow such claims to be proved; but the writer omits to cite the decision of Judge Woodruff *In re Cornwall*, 9 Blatchford, 114, (6 N. B. R. 305), which rejects similar claims and overrules the two decisions which admit them." Now three decisions on one side of a question, and two on the other, would certainly tend to show uncertainty of the construction of a law, even if the two were subsequently overruled within the limited jurisdiction, where alone either the later or the earlier decisions would have any binding force. But, further, the case of *Cornwall* can hardly be said to overrule the prior cases. As I understand it, nothing is further distinctly decided in that case, than that a petitioner, alleging a claim which is barred by the statute of limitations, cannot maintain an involuntary petition, and that the alleged debtor may dispute the claim on that ground, and have the petition dismissed. This is very far from settling the point, that an outlawed claim either is not provable, or may not be proved, if the debtor does not object. Judge Woodruff says, "The precise question in this case is, whether one who alleges that he is a creditor by a debt which is, under the state law, barred, can become a prosecutor in the court of bankruptcy, and demand that on his petition and proofs the respondent be adjudged a bankrupt. A conflict of opinion is found in the decisions of some of the district courts, on the question whether, after a debtor has

been adjudged a bankrupt, a debt barred by the state statute shall be allowed to share in the distribution of the estate." *Cornwall's Case*, 9 Blatch. 135. I do not find that this decision distinctly overrules any prior one. It seems to be predicated in part upon the somewhat peculiar law of Connecticut, which absolutely avoids an outlawed claim; and occupies considerable space in replying to the rather fanciful argument urged by counsel, that the language of the bankrupt law indicates a purpose to do away with the statute of limitations in bankruptcy proceedings.

I would also refer, as indicating an uncertainty not yet cleared up, to two sentences in *Bump on Bankruptcy*, the most approved manual now in use. He says (p. 566): "A debt is provable, although it may be barred by the statute of limitations of the state where the petitioner resides;" and cites two cases to sustain this position, and four *contra*, one of which is *Cornwall's case*. This passage is found in the somewhat miscellaneous collection of cases appended to the successive sections of the act; but in the text of the work, in the chapter upon proof of debts, the same author says: "The defence of the statute of limitations need not be anticipated, for the defence must be set up affirmatively by the party relying on it," to which he cites *in re Knäpfel*, 1 B. R. 70; 1 Ben. 398.

Perhaps the general meaning and purpose of our former communication may be slightly illustrated by the following brief extract.

In construction of the insolvent law of Massachusetts, which might well be termed a state bankrupt law, the court remarked: "The reason for making this provision (confering chancery jurisdiction of insolvency cases upon the supreme court), is to be found in the character of the insolvent laws—one important object which is expressed by the statute in respect to the jurisdiction of this court is, to establish and maintain a regular and uniform course of proceedings in all the different courts." *Lancaster v. Choate*, 5 Allen, 535. Whether there is any practicable mode of subjecting the general bankrupt law to such final construction, I offer no opinion; as to its desirableness, I entertain no doubt. The restricted jurisdiction of the circuit and the supreme courts is by no means adequate to the regularity and uniformity referred to by the court in Massachusetts. F. H.

Bankrupt Act—Bankruptcy of Partnerships—Insolvent Proceedings in State Court—Duty of State Court to Surrender Assets.

The Supreme Court of Georgia has lately decided some interesting points in a number of cases growing out of the insolvency of the firm of Ferst & Co. The cases, which were heard together, are entitled as follows: *Ballin & Co. v. Ferst & Co.*; *Shuster, Son & Co. v. Ferst & Co.*; *Seligman et al., Trustees v. Ferst & Co.*, and *Ballin & Co. v. Clements, Clerk*. In Georgia, the Judges of the supreme court draw up a written syllabus of the points decided, and afterwards one of them writes the opinion of the court. The points which we now present are stated in the 7th, 8th and 9th paragraphs of the official syllabus, the facts being as follows: A creditors' bill was filed by M. Ferst & Co. and others in the Superior Court of Chatham County, Ga., on October 12th, 1874, against Samuel Kaufman, Henry Mayer and Charles H. Kaufman, as copartners under the firm name of H. Mayer & Co., under which bill injunctions were granted, directed principally against various pressing creditors of the Kaufmans and Mayer, and a receiver was appointed who took possession of all the assets of that particular firm. In April, 1875, Seligman and others filed a petition in the equity cause, by which they alleged that on the 31st of October, 1874, the Kaufmans and Mayer were adjudged bankrupts in the District Court of the United States for the Southern District of New York, and that they, the petitioners, had been duly appointed trustees of the estate of said bankrupt; that in January, 1875, they

had filed a bill in the District Court of the United States for the Southern District of Georgia, against the complainants in the state court bill, alleging the above facts, and praying that the said complainants might be enjoined from proceeding with their bill; which injunction had been granted by the Hon. John Erskine, United States District Judge. The trustees, by their petition, prayed that the state court receiver should be ordered to turn over the assets of H. Mayer & Co. to them. They attached to their petition a record of an adjudication in bankruptcy in the said District Court of New York, on the 31st of October, 1874, of the Kaufmans and Mayer, on the petition of creditors of the said debtors, under the firm name of Kaufman & Co., of New York. The petition in bankruptcy alleges that the petitioners were creditors of L. Kaufman & Co., which in the statement of their several demands they alleged that the three partners were also copartners in Liverpool, England, and in Savannah, Ga., under the name of H. Mayer & Co. The adjudication was in the usual form against the individuals, Samuel Kaufman, Henry Mayer and Charles H. Kaufman, without mention of the several firms which they composed; and proceeded to declare them bankrupt in conformity with the provisions of the act of March 2, 1867, as in the original form of adjudication ordered by the Supreme Court of the United States, while in point of fact the proceedings were under and conformed strictly to the act of June 22d, 1874, and the revised statute. Upon the presentation of the trustees' petition, Judge Tompkins, presiding in Chatham Superior Court, dismissed it, holding and announcing that the general repealing section of the revised statutes had repealed the act of March 2, 1867; and assigning as ground of dismissal in his order the existence of error apparent on the face of the trustees' petition.

This decision, being carried to the Supreme Court of Georgia, was reversed, the court announcing by the following head-notes, the principles upon which they based their judgment of reversal:

7. Where three persons constitute two separate partnerships engaged in business, similar or dissimilar, in different states, each partnership having a distinct firm name, an adjudication of bankruptcy in either jurisdiction, on petition of creditors of the firm only, will apply to all the debts and assets of both partnerships.

8. The bankrupt act of 1867, as contained in the revised statute of 1874, and amended by a separate act of Congress passed on June 22d, the same day the revision was adopted, is still in force; and a judgment of adjudication which recites the act of 1867 as authority for the proceeding, had in October, 1874, is not even irregular, much less void.

9. Trustees in bankruptcy duly appointed after lawful adjudication, are entitled to all assets of the bankrupt seized on *mesne* process issued from a state court, (not based on a specific lien created by contract), provided the seizure was made within four months prior to the adjudication, and provided an injunction has been granted in bankruptcy restraining the plaintiff in the state court from proceeding further therein. And the state court, on petition from the trustees, supported by proper record evidence, should order its receiver or other officer to surrender such assets for due administration in the court of bankruptcy.

Woman Suffrage in its Legal Aspect.

A REVIEW OF THE CASE OF MINOR V. HAPPERSETT, 21 WALLACE, U. S. REPORTS.

As a rule, respect should undoubtedly be paid to judicial decisions. When the court of last resort has considered and passed upon a question of law, especially if it be one involving a consideration of constitutional power, as well as of private right, it is eminently proper that its conclusion should not be disturbed, unless for reasons of the gravest import. But cases present themselves at times, in which criticism is not only justified, but is demanded; and it is only through its aid that the ultimate truth of any question can be reached and its principles be correctly established. Nor can courts of justice take exception to such criticism, since the reports abound with evidences of the fact that there is no judicial immunity from error; and we believe that if the glamour of supposed

legal impeccability, that shrouds the judiciary in the eyes of many, could be removed, a public service would be accomplished. In the case under consideration an important question of constitutional law was involved, the construction of which affected not only the plaintiff therein, but the entire class of persons to which she belonged, while the decision extends it still further, and makes it applicable to every citizen of the United States. Thus, while the particular case may be ended, the entire community has an interest in the conclusion announced. It is not our purpose to consider the subject of suffrage as an abstract right; with this aspect of it we have nothing to do in this article. We shall treat it solely as a legal right. Under a government of law, indeed, there are, properly speaking, no abstract rights. All rights, of person or of property, are legal rights, and it shall be our purpose to show that the right of federal suffrage is recognized in the constitution of the United States, and certainly no one will deny its practical exercise during nearly ninety years. An inspection of the Opinion will show that the whole matter was summed up in the question, whether suffrage is a right or privilege appertaining to citizenship of the United States, for if it be, then the plaintiff's suit was rightly brought. The opinion, which was delivered by the Chief Justice, states the matter as follows: "It is contended that the provisions of the constitution and laws of the state of Missouri, which confine the right of suffrage and registration therefor to men, are in violation of the constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage, as one of the privileges and immunities of her citizenship, which the state cannot by its laws or constitution abridge." And on page 170: "If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the constitution of the United States, as amended, and consequently void. The direct question is therefore presented, whether all citizens are necessarily voters. The constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. It certainly is nowhere made so in express terms. The United States has no voters in the state, of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters." We had supposed that if there was any question that now, at least, might be regarded as finally settled, both by the late appeal to arms, and by the constitutional amendments, it was that of the subordination of state to national authority, over any and all subjects in which the rights and privileges of citizens of the United States are involved. If the amendments do not cover this ground, then they are worse than useless. And yet this decision is a blow at all that constitutes us a nation. To declare that the United States has no voters—that its officers are all elected by state voters, is to completely reverse the order of things, and subordinate the citizens of the United States to state authority. It will be observed that this decision goes far beyond the ground hitherto and ordinarily claimed by the advocates of what are called "States' Rights."

It has usually been supposed that the states possessed the authority to regulate the exercise of the franchise by the federal voter, but never before was the right itself denied, as appurtenant to federal citizenship. But now the franchise itself is declared to be non-existent—federal officers are elected by state voters. The subject itself is wholly withdrawn from federal supervision and control. Even the amendments cannot confer authority over a

matter that has no existence. If, then, the United States has no voters in the states, it can properly have nothing to do with the subject of elections. If the citizen of the United States has no right to vote except as a citizen of a state, his federal citizenship is, of course, subordinated to his state citizenship. It logically follows that much of the recent legislation on this subject by Congress is destitute of authority. If members of the House of Representatives are elected by state voters, as here declared, there is no reason why the states may not, at their pleasure recall their representatives, or refuse to elect them, as, in 1860, the southern states claimed it to be their right to do; and if a sufficient number can be united in such a movement, the federal government will be completely at their mercy. It may also well be doubted how far the southern states are bound by legislation in which they had no part. Notwithstanding the provision of the 14th Amendment, that neither the United States nor any state shall assume or pay any claim for the loss or emancipation of any slave; if (as held by the supreme court in two cases in 13th Wallace, Chief Justice Chase dissenting), contracts for the sale or hire of slaves effected before emancipation are valid, upon the ground that to take away the remedy for their enforcement would be to impair their obligation, how much less can the owner of a slave be deprived of his property, which forms the subject matter of that contract, without compensation? If his contract cannot be impaired, surely the thing to which that contract relates cannot be taken from him, except upon compensation. Chief Justice Chase was of the opinion that the above quoted provision of the Fourteenth Amendment could be sustained only upon the ground that the Thirteenth Amendment wiped out everything, contracts as well as slavery. Yet the court held all such contracts to be valid. And see, in this connection, the case of *Wilkinson v. Leland*, 2d Peters 657. It is idle to say that these suppositions are visionary. What has happened once, may occur again. It can hardly be questioned that if in 1860 the seceding states could have pointed to a decision of the Supreme Court of the United States such as this, the whole face of affairs might not have been different, and the "Erring Sisters" permitted to "go in peace!" The "lost cause" may not be "lost," after all.

But to resume: The court tells us in its opinion in this case, that "there cannot be a nation without a people"—but it seems there may be a nation without voters! Now the people of the United States may not have a very profound knowledge of their institutions, but their intelligence certainly rises to the level of comprehending that a republican government cannot be established or maintained without voters. It would be a manifest absurdity to say that in a government created by the people, they are not voters. Inasmuch, then, as it is admitted by the court, if the right of suffrage be a privilege of the citizen of the United States, that the state constitution and laws confining it to men are in violation of the constitution of the United States, and consequently void, as contended for by the plaintiff in this case, we have really only to examine this single point: Does the constitution of the United States recognize the right of suffrage, as belonging to its citizens?

Future generations will look with astonishment at the fact that such a question could be asked seriously. Not only was the subject debated in the convention that framed the instrument, but one of its ablest members, Alexander Hamilton in the 52d number of the *Federalist*, says: "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the states, would

have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the state governments, that branch of the federal government, which ought to be dependent on the people alone. To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state; because it is conformable to the standard already established, or which may be established by the state itself. It will be safe to the United States; because, being fixed by the state constitutions, it is not alterable by the state governments, and it can not be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution."

Again, in the Fifteenth Amendment, suffrage is recognized as an existing right of federal citizenship. It is not created by that amendment. It was already existing. The language is, "*The right of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.*" A right must exist, before it can be denied. There can be no denial of a thing that has no existence. If it should be said, the Fifteenth Amendment relates only to the negro, we reply that this would be no answer, even if true, which may be doubted, but the point we are now discussing is the statement of the court that the United States have no voters in the states of its own creation, or in other words, that federal suffrage does not exist: we have shown that this is a mistake, it being recognized in the constitution; and as the argument of the court was based on its non-existence it consequently falls to the ground. This really disposes of the case, but we will notice other points. The court says: "After the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a fifteenth: * * The Fourteenth Amendment had already provided that no state should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the constitution to prevent its being denied on account of race, etc.? Nothing is more evident than that the greater must include the less, and if all were already protected, why go through with the form of amending the constitution to protect a part?" It is sometimes perilous in argument to ask questions—we will answer the court in its own words. In the *Slaughter House* cases, the court then said: "A few years experience satisfied the thoughtful men who had been the authors of the other two amendments, that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which, freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence the Fifteenth Amendment, which declares that the right of a citizen of the United States to vote, shall not be denied or abridged by any state on account of race, color, or previous condition of servitude. The negro having by the Fourteenth Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union." 16 Wallace, 71. For the present argument, it is immaterial whether this result is effected by the Fourteenth, or Fifteenth Amendment, or both. The point is, that the supreme court here declares the negro to be a voter in every state of the Union, by virtue of one, or both

amendments. He is made a voter (a federal voter) *by the law of the United States, and not by the state law.* Being made a citizen of the United States, *he is thus made a voter in every state of the Union.* This is the very *gist* of the matter. The whole principle is summed up in these few words. The franchise is an incident of the *status*, or condition of citizenship. Freedom alone was not enough. The Thirteenth Amendment made the negro free, but *citizenship* was additionally necessary, before he became a voter. As soon as that was achieved, in that moment the franchise followed; to be enjoyed, in the same manner as by other citizens. If ever a suitor was entitled to rely with confidence upon judicial utterances of great principles of law, Mrs. Minor was thus entitled, in her case. She was a citizen of the United States by birth; admitted to be possessed of every qualification but that of sex. Her counsel appeared before this court and quoted its very language above given, and asked the court to be consistent with its own teachings. But no. There was no great and powerful party to back her demand, as in the case of the negro. She was merely a private individual, and the court contented itself with saying, that the right of suffrage when granted, would be protected! To which it may be replied, if women ever vote, they will protect themselves: but, if their right should subsequently be denied by the state, the supreme court, according to its own rulings in this case, could give no protection, since it declares the right to be wholly within the control of each state. But why should the court require the women citizens of the United States to produce a special grant of the right, when it required nothing of the kind from the negro. Are there two laws in this country, one for the negro, and another for women? Does the constitution of the United States recognize or permit class distinctions to be made between its citizens? Yet by this decision, the negro is placed above the woman. He is her superior. His position is above her. For our own part, we decline to accept any such construction of that instrument, knowing that the time will ultimately come, when some claim similar to that of Mrs. Minor, will meet with proper recognition. To make its inconsistency still greater, the court in this case declares that "allegiance and protection are reciprocal obligations. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection," yet in this case that protection is denied. While the negro then is thus declared to be a voter, by reason of his citizenship, in every state of the Union, there is no law, either of the state, or of the nation, which in terms or by words confers the ballot upon him. The Fifteenth Amendment does not confer it, but treats it as a right already existing, and forbids its deprivation. Likewise the state law assumes its existence, and makes no change, except to conform to the new condition of the negro's citizenship. There is no change in the state laws, except the omission of a word—the word "white," from the clause "white male citizens," in the state constitution. But who ever heard of a right being conferred by omission? And yet this change of a single word by the state, was an acknowledgment by it of the supremacy of federal law, touching this subject; and was designed to make the state law conform to the federal law, which declares (14th Amendment), that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This conformity extends, however, only so far as to embrace the *negro citizen* of the United States, leaving the far larger class of *women citizens* of the United States, still under ban of disfranchisement, in plain violation of the amendment. Under these circumstances, in the case under consideration, the Supreme Court of the United States was asked to interpose its authority, and effect by its decree that which

the state should have done, and declare that the word "male" must be dropped, as well as the word "white."

Had this been done, the state law in its entirety would have conformed to the paramount law of the United States, while as it is, it conforms only in part. We are told that slavery was abolished in Massachusetts, not by an enactment expressly adopted for the purpose, but by a decision of the supreme court in 1781, that its existence was inconsistent with the declaration in the Bill of Rights that "all men are born free and equal." Bradford's History of Mass. 11, 227; Draper's Civil War, 1, 318; Story on Const. 11, page 634, *note*. So far, however, from interfering, as it was its plain duty to have done, to protect this class of United States citizens, the court has gone further than perhaps it intended, and possibly destroyed the rights of another class, for the decision, by declaring that the United States has no voters, virtually renders the Fifteenth Amendment of no effect. There is nothing upon which it can operate. There being no voters, there is of course no "right to vote," to be "protected." So that every citizen of the United States is left completely at the mercy of the state.

We will now consider that clause of the Constitution of the United States in which, as Hamilton said, the right of suffrage is defined and established for the citizens of the United States; which, nevertheless, has most strangely been regarded as conferring upon the states authority to disfranchise them. Article 1, sec. 20. "The House of Representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." The section, it will be seen, consists of two clauses, but there is not a word as to the sex of the elector. He or she must be one of the people, or citizens—that is all. The "People" elect. They vote in their respective states, of course; or, to use the words of Chief Justice Marshall, "when they act, they act in their states." (4 Wheaton, 403.) This first clause, then, *fixes the class of persons* to whom belong this right of suffrage—federal suffrage—not state suffrage. It would be absurd in the federal constitution to undertake to deal with state suffrage, and it attempts nothing of the kind. The right of federal suffrage, then, attaches or belongs to this class. The subsequent clause is subordinate to this, and relates, not to the right, but to the exercise of it by the voter. In other words, it prescribes the qualifications of the elector, as to how he shall exercise the right; the time, place, and manner of voting, and the age, at which the right shall be enjoyed. As to all these matters, which are included in the subject of "qualifications," instead of laying down a uniform rule, to be applicable all over the Union, the convention thought it best to adopt the regulations on this subject already in force in the several states. When the federal elector, therefore, comes to vote for United States officers, he finds that he must simply conform to the regulations laid down by the state for state voters. But this confers upon the state no authority over the federal elector's *right of suffrage*; far less does it give the state authority to deprive the federal elector of this right, under pretence of laying down for its own citizens an arbitrary and impossible condition. In the nature of things, a republican government could not part with this right of suffrage. As Hamilton says, such right is justly regarded as a fundamental article in such government. To part with it, would be to part with its chiefest attribute of sovereignty, and nothing of the kind was done, or intended.

Except so far, then, as this decision makes it so, there is not a particle of authority vested in the states to deny this right of federal suffrage to the citizen of the United States. The regulation of the exercise of the franchise, is within their control, as above stated, but the right itself, is not

theirs to give, or to withhold. The right to vote for federal officers, is wholly distinct from the right to vote for state officers; but the fact of these two rights being blended in one and the same *person*, and being usually exercised at the same time, has given rise to the whole difficulty. In consequence of the fact of the election being conducted by state officers, the state providing all the machinery for voting, etc., we have become accustomed, from long habit, to associate in our minds the one franchise with the other, and thus confound rights that are wholly separate and distinct.

We notice, in conclusion, the remark of the court touching the non-assertion heretofore of this right by any one of the class now claiming to be entitled to it, and the intimation, or insinuation, that if the right really existed, it would have been claimed before, etc. It is true, that Mrs. Minor's case is of "first impression," in the Supreme Court of the United States; but we fail to see that this fact has any thing to do with the principle involved, or that there can be any such thing as a "limitation" of rights that are fundamental. If the right exists, and has a constitutional recognition, the time of its assertion has nothing to do with it. Only weak minds will be influenced by a fallacy like this. Because the women of a former day did not see and feel the necessity of making this claim, is no reason why those who do now see and feel that necessity should have that claim denied. "Time has no more connection with, or influence upon principle, than principle has upon time. The wrong which began a thousand years ago, is as much a wrong, as if it began to-day; and the right which originates to-day, is as much a right, as if it had the sanction of a thousand years. Time, with respect to principles, is an eternal now. It has no operation upon them, it changes nothing of their nature and qualities." (Paine's Political Works, vol. 2, p. 328—Dissertation on Government.)

We are fully conscious that the subject upon which we have written is by no means exhausted; the point, especially in reference to bills of attainder, being wholly untouched. But the limits of a single article will not admit of a full discussion of the subject. Indeed, a treatise upon suffrage is one of the wants of the profession. We leave it, however, to the candid judgment of our readers, if we have not fully demonstrated the right of federal suffrage to be a necessary privilege of a citizen of the United States, and, according to the court's own admission, such being the case, the plaintiff was entitled to the relief sought. *

The Wife's Separate Estate.

WILLIAM M. MARKS v. THOMAS W. COWLES ET AL.

Supreme Court of Alabama, 1875.

1. **Cverture.**—The reason and nature of the common law disabilities of coverture with regard to the purchase and conveyance of real estate, considered.

2. **Wife's Separate Estate.**—The provisions of the Alabama statutes as to the wife's separate estate, the wife's rights therein, and the duty of the husband as trustee thereof, reviewed and criticized.

3. **Mortgage by Husband and Wife of the latter's Separate Estate.**—In Alabama, husband and wife can jointly purchase real estate in the wife's name, accept a conveyance of it, and contemporaneously execute a mortgage upon the estate as security for the purchase money; and if money that constitutes the *corpus* of the wife's separate estate is paid for the property, the wife can not, during coverture, repudiate the transaction and claim that the land be charged with the repayment to her of the money. And while no personal liability attaches to the wife, the land is charged with the payment of the consideration money, and may be sold under the mortgage on default in payments.

BRICKELL, C. J. This cause was before this court, at the January term, 1872, and the opinion then pronounced, is reported, *Cowles v. Marks*, 47 Ala. 612. There has been no new fact introduced which authorizes a change or modification of the former decision, and the decree of the chancellor conforms strictly to it. Prior to the statute (R. C. sec. 3510), the rule frequently announced, and rigidly adhered to, was that a decision of the court, however erroneous, was the law of the particular case in which it was rendered, and could not be questioned in the primary

court, or on a second appeal. Until there was such a change of facts, as rendered the decision inapplicable, error could not be imputed to the primary court, because it conformed its judgment to the decision. But for the statute our duty would be an affirmation of the decree of the chancellor, because of its conformity to the former decision, without permitting an enquiry into its correctness. The statute was intended to abrogate this rule, never satisfactory to many members of the profession, and is imperative in its terms, devolving on the court, the duty of enquiring into and declaring the law of the case, as if the former decision had not been made. The policy of the statute is not a matter for our consideration. It may protract litigation—impair the dignity of the judgments of the court of last resort, and may introduce and foster a want of confidence in the administration of the law. Its enactment was within legislative competency, and obedience to it, is our only duty.

The admitted facts, are, that Laura S. Cowles, a married woman, having a statutory separate estate, with the concurrence of her husband, purchased of John B. Scott, a tract of land adjoining a plantation held by her, which was necessary to the profitable use and enjoyment of the plantation, adding to its value, more than the price contracted to be paid. Mrs. C. paid a part of the purchase money in cash, and for the remainder executed promissory notes, in which her husband joined. A conveyance of the land was made to her by Scott, and she and her husband contemporaneously executed a mortgage properly attested, to secure the payment of the promissory notes. Subsequently she made a payment on one of the notes. Possession of the lands followed the sale and conveyance, and for near ten years before the filing of this bill, they were used and occupied in connection with said plantation.

Payment of the notes given for the purchase-money, not having been made, under a power in the mortgage sale was made of the lands, and the appellant became the purchaser. He sued in ejectment for the recovery of the lands, and defence was made on the ground that the mortgage was void, because of Mrs. Cowles' coverture. This bill was filed by appellant to quiet his title to the lands. Mrs. Cowles answered and filed a cross-bill, alleging her incapacity to make the purchase, accept the conveyance, and execute the mortgage; that the whole transaction was a nullity, and she had an equity to charge the lands with the repayment to her, of the moneys she had paid, in priority of any lien for the amount due on the notes for the purchase-money.

The case presents two questions, which may be thus stated: Can husband and wife, in the name of and for the wife, purchase real estate, accept a conveyance, and contemporaneously execute a mortgage of the estate, as security for the payment of the purchase-money? If on such purchase-moneys, the *corpus* of the wife's statutory separate estate, are paid to the vendor, can the wife subsequently, during coverture, repudiate the transaction, and claim that the lands be charged with the repayment to her of such moneys? The former opinion asserts the incapacity of the wife, declares the transaction void, and that a trust results to her to charge the lands with so much of her moneys as were invested in the purchase.

We propose to consider these questions separately. The incapacity of the wife, with or without the concurrence of her husband, to purchase and accept a conveyance of real estate, if it exists, is derived either from the common law, or from statute. The husband concurring, there could at common law be no question during coverture of the validity of the purchase and conveyance. Without his concurrence, its effect depended on considerations, deducible from the principle by which husband and wife were regarded as but one person, and her legal existence suspended during the matrimonial union. The wife had not capacity to bind herself, but the want of capacity was not the result of a want of discretion, imputed to her as a matter of law, as it was imputed to infants. It was founded on the character and nature of the relation of marriage, which placed her under the power and protection of her husband, deprived her of the administration of property, and transferred to him dominion over all property real or personal of which she was seized or possessed, or of which a right of seizin or possession accrued during coverture. The personal property of the wife in possession, passed on the marriage to her husband, and that which lay in action became his on its reduction to possession. Of the lands of the wife, of which she had an estate of inheritance, he became seized, entitled to the rents and profits during their joint lives, and by possibility during his life. Deprived of the ad-

ministration of property, subjected to the power and protection of her husband, incapable of suit to which he was not a party, her incapacity to contract was a logical and legal sequence. In the obligation of her contracts, if capacity could have been imputed to her, the husband would have been bound, for they could operate only on property to which the law gave him title, absolute or qualified. Or, it may have been the wife had brought him no fortune, and such contracts would have vested the wife with an indirect power of charging his estate. The harmony of the relation would have been disturbed by conflicts between them, as to the contracts which should be made, and the inconsistent duties their several contracts might involve. These were the considerations on which the common law pronounced the general incapacity of the wife to contract. There are exceptions to the general rule, dictated by reason and justice. A recognized exception was, that the wife could purchase an estate in fee without her husband's consent, and the conveyance was good, if the husband did not avoid it by some act declaring his dissent; and after the husband's death the wife could waive or disagree to the purchase. 2 Kent, 150; 1 Thomas' Coke, 105; 2 Bright on Hus. & Wife, 38. If the husband neither agreed or disagreed, the purchase by the wife was good. She could take an estate upon condition, and was bound to perform the conditions, "because it does not charge her person but the land." Patterson v. Robinson, 25 Penn. St., (1 Casey), 81. In the case before us, the husband expressly assented to the purchase made by the wife, and the conveyance made to her. At common law the purchase and conveyance would be valid, subject only to power of the wife, to disaffirm on the termination of her coverture,—a power she was incapable of exercising during coverture, for the same reasons she was incapable of contracting. Taking an estate in fee, the husband acquired rights she could not divest. If duty or responsibility attended these rights, his assent to the purchase and conveyance was his voluntary subjection to them.

If the case was determinable on common law authorities and principles, the former opinion, affirming the incapacity of the wife, would be erroneous. Her incapacity to purchase, and to accept a conveyance, absolute or on condition, could not be asserted; and if it could be, she would be equally incapable during coverture of disaffirming or avoiding. Disaffirmance or avoidance would lie only within the power of the husband, during the coverture, and was not within his power after having once elected to assent.

It is a rule of very general, if not of universal application, in a court of equity, that a deed conveying lands unconditionally, and a mortgage made by the grantee, to secure the payment of the purchase-money, contemporaneously executed, constitute one transaction. The two are read together as if they were but parts of a common instrument, and, practically, the legal effect is that the grantor in the conveyance, absolute in form, really creates in the grantee an estate on condition, becoming absolute only on the payment of the purchase money. If, at common law, such a deed was made to the wife, and such a mortgage was executed by her, without the consent of her husband, in a court of equity she would be deemed and treated as the trustee of the grantor, and the land would be subject to the payment of the purchase money she had agreed to pay. 2 Bish. Married Women, § 600; Hatch v. Morris, 3 Edw. Ch. 313; Ramborger v. Ingraham, 38 Penn., (2 Wright), 146; Patterson v. Robinson, *supra*. If such a transaction was assented to by the husband, a court of equity would compel him and his wife to execute a valid mortgage to secure the payment of the purchase money. Leach v. Noyes, 45 N. H. 364. No personal liability was in either case fixed on the wife, and no personal judgment or decree could be rendered against her. The land only was charged with the payment of the consideration money. These principles of the common law, and of equity, are of full force in this state, unimpaired by legislation. We have statutes enlarging the capacity of the wife to hold property, freeing her estate, real and personal, from the common law marital rights of the husband, and empowering her to make conveyances, into which she could not enter at common law. We have no statutes abridging her capacity to contract, as recognized at common law, or subjecting her to new disabilities.

At common law, if the wife in making such purchase, parted with personal property, it was not hers, but the property of the husband. Of consequence, parting with such property could not raise any trust or equity in her favor to charge the land with reimbursement, if her husband dissented, or after the termination of coverture she disaffirmed. The husband assenting, could not claim such property; and

if he dissented, his remedy was at law, for the conversion or detention of the property, or if it was money, in an action for money had and received, to which he was entitled *ex equo et bono*. If the money was of the equitable, separate estate of the wife, as to that estate, in a court of equity, she was deemed a *femme sole*, and no question of her capacity could be raised. In the absence of statutes changing the common law, the mortgage executed by husband and wife, in the mode prescribed for the conveyance of the wife's estate, is a valid security.

The former opinion pronounced in this cause, proceeds on the hypothesis that the statutes creating the separate estates of married women, or, more properly speaking, freeing the property of the wife from the marital rights of the husband, as declared and defined at common law, and prescribing the mode in which her property is to be held and alienated, so limits and narrows her capacity that she cannot, with the concurrence of the husband, purchase lands and take a conveyance in fee.

We have already said the statute does not diminish the capacity of the wife, as recognized at common law. She has now, as she had at common law, as full capacity to take and receive property, real or personal, as if *sole*. Her incapacity was, at common law, to hold and transmit. 1 Bish. Mar. Women, § 699. It is to this incapacity, and not to her capacity to take and receive, the statute refers. The incapacity is removed, to a large extent. The wife may not only take, but she holds and transmits, subject to the provisions of the statute, as if she was *sole*. If holding and transmitting involves a personal liability, she is as incapable of incurring it, according to the statute, as she was at common law, for the simple reason that though her capacity of holding and transmitting is enlarged, she is still *sub potestate viri*, and the capacity to incur such liability is not conferred, consequently the common law prohibition against incurring it, remains of full force. Such, in effect, was the decision of this court in Becton v. Selleck, 48 Ala. 226, in which a conveyance of real estate to a wife, with the concurrence of her husband, in satisfaction of a debt due the wife, and a mortgage executed by husband and wife, to secure an excess of the value of the estate above the debt, was sustained.

The purpose of the bill is not to fix a personal liability on the wife. No judgment or decree binding her personally, can be rendered on it. Nor is it proposed to subject her statutory estate to the payment of the notes executed by husband and wife, for the purchase money of the lands. The equity of the bill is satisfied, when it is declared, the lands are subject to the payment of the purchase money, the condition on which the conveyance to the wife was made, and that the appellant by his purchase acquired title. The authorities to which we have referred, support the validity of the conveyance and mortgage; and appellant's purchase at the mortgage sale, not being impeached for inadequacy or unfairness, and no offer to redeem being made, he was entitled to that relief.

The next question arises on the cross-bill of Mrs. Cowles, by which she seeks to repudiate the purchase as void and claims trust on the lands, for the money she had paid. As we have seen, the right of disaffirming the purchase and conveyance during coverture, did not pertain to her at common law. We shall not now inquire whether the statutes have wrought a change in the common law in this respect. We prefer to rest our opinion on the proposition that the husband, as trustee of the wife, has under the statute, power to invest with the concurrence of the wife, moneys, the *corpus* of her statutory estate, in the purchase of lands. This question has not heretofore been presented to this court except on the former decision of this cause.

The proper construction of the statute declaring the property of the wife her separate estate, has perplexed the courts and the bar; and the uncertainty attending it, is the source of distressing insecurity in the community at large. What is the true legal *status* of the wife—what are her powers of contracting—what are the powers and duties of the husband, and his real relation to the wife's estate, it is a matter of profound regret, are not more clearly defined in the statute. When such a radical change was wrought in the law of the most important of the domestic relations; when the community were compelled to depart from their habits and customs, and to observe a new rule of action, in direct repugnance to well known laws, the new rule should have been clearly expressed and adapted to meet the exigencies springing out of the necessary and ordinary transactions of life. The vexatious litigation which has followed its enactment, is the legiti-

mate consequence of a statute so nearly touching the domestic affairs of the community, in which so much is left to implication or construction.

The statute first declares, all property of the wife, held by her previous to the marriage, or which she may become entitled to in any manner, is the separate estate of the wife, which is not subject to the payment of the debts of the husband. Then, it is declared, property thus belonging to the wife, vests in the husband as her trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs or legal representatives, for the rents, income and profits thereof; but such rents, income and profits are not subject to the payment of the debts of the husband. The property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them, jointly by instrument of writing, attested by two witnesses. The proceeds of such sale is the separate estate of the wife, and may be reinvested in other property, which is also the separate estate of the wife; or such proceeds may be used by the husband in such a manner as is most beneficial for the wife. The husband has power to receive property coming to his wife, or to which she is entitled; and his receipt therefor is a full discharge in law and equity. For necessities for the family, the separate estate of the wife is liable in an action at law, against the husband alone, or against the husband and wife jointly. R. C. sec. 2371-77. In suits at law, relating to the separate estate, the wife must sue or be sued alone. R. C. sec. 2525. It is observable that while to husband and wife is given the power of alienating, it is manifest, the alienation contemplated is a sale only. It is the proceeds of sale, which remain as the property sold was, her separate estate, which may be reinvested in other property becoming her separate estate, or which the husband may use as most beneficial to her. The statute is silent as to money, the *corpus* of the wife's separate estate, not the subject of alienation, but the subject of conversion into other property, or of investment, unless it is derived from a sale of other property. It is not contemplated such moneys shall remain in the keeping of the husband a barren and unproductive fund. It is expected these and all the wife's separate property will yield an income, if it is real estate, in the way of rents—if personal property, in profits. These the husband takes, without liability to account, and freed from liability to his debts. The power of the husband is to receive the property of the wife, a power he is not required to exercise concurrently with the wife. His receipt therefor is a full discharge in law and in equity to the person to whom it is given. His duty is to "manage and control the property." The management and control the husband is to exercise must be conservative of the estate. Not of the particular form in which he may receive it, but preservative of it from loss or diminution, and so that during the trusteeship, and after its termination, it will produce income and profit, and promote the convenience and comfort of the wife and her family. The lands may be leased or rented, or cultivated at the discretion of the husband. Money may be loaned on the usual security, or invested in governmental or other securities in which men of ordinary prudence would invest their own. The *corpus* of the estate may consist wholly of money and the wife may be without a homestead. It would be the right and duty of the husband to invest so much as was necessary, in the purchase of a homestead suitable to the degree of the wife's fortune, and her condition in life. Keeping in view the preservation of the estate, and the benefits which may result to the wife, the husband may make such investments of the wife's money, as he may deem best. If there is a want of prudence, in making such investments, it would be cause of his removal from the trusteeship, as it would be for the removal of any other trustee, who abused or misused a discretion with which he is clothed. Any wilful dereliction of duty, in making such investments, in which strangers participate with him, renders them answerable for the loss their collusion may produce.

It is said in the former opinion in this case, that if an investment of the wife's money, not derived from a sale of her property, is sought, the husband should apply to a court of equity for authority and direction. The only parties to such a suit, would be husband and wife, and we cannot suppose it was contemplated that they should be made to bear even seemingly the relation of adverse suitors, or that there should be judicial intervention and supervision, whenever the husband had moneys of the wife, which ought to be invested, or that the estate should be subjected to such expense. The tendency of such a construction of the husband's power and

duty, would be to introduce frequent causes and occasions to disturb the harmony of the marital relations, which it is the paramount policy of the law to preserve. Though a trustee, he is husband, and bound by all the ties of the relation to protect and preserve the interests of the wife. He is entitled in his own right to the rents and profits. These it is supposed are sufficient safeguards for fidelity in the exercise of his powers. If they prove insufficient, the statute provides for his removal from the trust. It is not sufficient argument to say, this subjects the wife to imposition from the husband. The relation itself, and all its influences, inspires, or should inspire in the wife unlimited confidence in the husband. This confidence is, and should be the distinguishing characteristic of the relation. Whenever confidence is reposed, there is danger of imposition, and against its abuse, it is almost impossible to guard. If we should indulge in ungenerous fears or suspicions of its abuse, or narrow and circumscribe the rights, powers and duties of the husband as the protector of the wife, to guard her from his errors of judgment, we would "loosen the bond whose principal virtue consists in its closeness."

If it is admitted a court of equity could have directed the investment of the wife's money, the investment made in this case would be sustained. It is a general rule that a trustee may safely do that without a decree of the court, which the court on a case made, would order or decree him to do. Perry on Trusts, sec. 476. Under the facts a court of equity would have directed a trustee to purchase the lands. They were adjacent to a large plantation, the estate of the wife, which was without timber to supply firewood or to keep in repair the enclosures and buildings. It was without convenient access to the railroad, on which the crops raised were transported to market. The lands purchased were timbered more than sufficient to supply the plantation, and afforded a convenient outlet to the railroad. They added to the value of the plantation, more than the price agreed to be paid for them, and that the price was fair and reasonable. These were the facts when the purchase was made, and it is these and not facts subsequently occurring, which human foresight could not anticipate or guard against, that a court of equity would regard, whether it was passing on the propriety of investment before authorizing it, or subsequently in sanctioning it. The court would have authorized the investment—the profitable use and enjoyment of the estate required it, and that is well done which the court would have ordered done.

We are compelled to overrule the former decision in this case. The decree of the chancellor must be reversed, and the cause remanded. If a sale of the lands had not been made under the decree of the chancellor, we would here render the proper decree, but that may render some further proceedings necessary in the court of chancery before a final decree is rendered.

Vessel-Master and Bill of Lading.

THE M. K. RAWLEY.

District Court of the United States, District of Massachusetts, December, 1875.

Before Hon. JOHN LOWELL, District Judge.

1. Delivery of Cargo—Signing the Bill of Lading.—Bringing a cargo to the wharf for shipment does not necessarily constitute a complete delivery, and as an act of delivery is open to explanation until the shipment is finished. A shipper may even retain possession, if he chooses, throughout the transit. Where, therefore, a shipper refused to let a cargo leave port unless the bill of lading was made out to his own order, the vessel-master had no alternative to sign it on the shipper's terms, or refusing to accept it altogether.

2. Liability for signing Bill of Lading contrary to Directions of Charterers.—A master signed a bill of lading to the order of the shipper, contrary to the directions of the charterers, who were the true owners of the cargo. The shipper then threatened the charterers that if they did not accept his draft, he would endorse the bill of lading over to a third party, and in order to obtain possession of the cargo, they accepted and paid the draft, and sued the master for damages to the amount of the payment, as for a breach of the charter-party. Held, that the master was not liable. When the property had once passed to the charterers the shipper could not re-vest the title in himself by obtaining the bill of lading, nor could he transfer a good title even to one claiming under him in good faith. The bill of lading is powerless as against the true owner. Whether the master could have been held for any expense to which the charterers might have been put to vindicate their title, or for possible injury to third persons who might have advanced money on the bill of lading in ignorance of its invalidity—*quære*.

This libel was by Messrs. Moseley, Wheelwright & Company of Boston, charterers of the schooner M. K. Rawley, for a breach of the charter-party. The case for the libellants was, that they took up the schooner for a voyage from Port Royal,

South Carolina, to Brunswick, Maine, and agreed to furnish a full cargo of hard pine lumber, at an agreed rate of freight; that the libellants were bound to furnish the lumber with dispatch at Brunswick, and ordered the cargo of Mr. Hudgins a manufacturer of lumber in Charleston, at twenty dollars per thousand free on board. They alleged that Hudgins with whom they had a running account, was indebted to them for the full value of this cargo, or that they had advanced such value to him. Hudgins shipped a part of the lumber, and took a bill of lading to his own order, which he indorsed to a third person as security for a draft on the libellants for one thousand dollars, which the libellants accepted and paid.

Thereupon the libellants, procured the brokers who had negotiated the charter, to write a letter to the master of which the material parts are these.

"Your charterers, Messrs. Mosely, Wheelwright & Co., wish us to write you not to sign any bill of lading except it reads to Mosely, Wheelwright & Co.; they do not want it to order. They say if the shipper will not furnish bill of lading to them, go off without one, and they will hold you harmless. They do not care to have you say that you are acting upon their advice."

When the letter was received, most of the cargo had been delivered, but the bill of lading had not been presented, and the master requested Hudgins to make it to the libellants, which he declined to do, and threatened the master that he would not let him leave the port, unless he signed the bill of lading as before; which the master then did. Then Hudgins telegraphed the libellants that he had procured a bill of lading to his own order, and should indorse it to some one else, unless the libellants would consent to accept a draft; they replied that they would accept to a moderate amount, and he drew for \$1,650 which they paid.

The damages sought to be recovered of the ship were the amount of the draft of \$1,650 which the libellants alleged that they were forced to accept and pay in order to obtain possession of the cargo; the bill of lading having been endorsed by Hudgins to a bank in Boston as security for the draft.

The answer asserted the claimants ignorance of the state of accounts between the shipper and the libellants, and averred that the master was bound and obliged to give the bill of lading in the form demanded by the shipper.

It was understood that Hudgins denied that the state of the account was such that the cargo had been fully paid for; but for the purpose of a preliminary hearing, it was admitted that that the libellants view of the account was the true one; the right being reserved to take evidence upon that point afterwards, if necessary.

J. C. Dodge, for the libellants; *J. T. Drew*, for the claimants.

LOWELL, J.—The libellants contend that the lumber was delivered to them when it was sent on board the ship which they had chartered to transport it. If this is so, their next point is sound that the vendor had no right to revoke his acts and reassert a dominion which he had once parted with. *Ogle v. Atkinson*, 5 Taunt. 759; *Stanton v. Eager*, 16 Pick. 467; *Bolin v. Huffnagle*, 1 Rawle 9.

But a vendor may make a conditional delivery, by which he does not divest himself of the control of the property, but makes the carrier his own agent. *Mitchel v. Ede*, 11 A. & E. 888; *Wait v. Baker*, 2 Exch. 1; *Ellershaw v. Magniac*, 6 Exch. 570, n.

A delivery at the wharf is an incomplete act, ambiguous in itself, and to be explained by the vendor at the time, or before the shipment is finished. In this case the act was explained not only by what followed, but by what had gone before; because in shipping a former part of the same cargo, the shipper had demanded and received a bill of lading in his own name.

The simple mode of stating the rights of the parties is, that however strongly one may be bound to convey his property to another, the title does not pass until the owner chooses to pass it, or until a court of equity compels him to pass it; and therefore, if, against all reason and right, he insists on retaining the possession, until the transit is ended, he does retain it. The only alternative for the master was to refuse to receive the goods on these terms. But this is not what the libellants wished, nor is their complaint that he failed to reject the cargo. They were not willing to pay dead freight. They therefore required him to do what he had no right to do, and promised to hold him harmless. He had no right to receive the goods on any other terms than those on which they were offered, he must accept or reject. If Hudgins had been a mere agent to forward the goods, the libellants might have

revoked his agency; but a vendor, even if paid, is not a mere agent.

The question has been lately decided in favor of the master in the court of Exchequer in England, by two judges against one; and it seems to me that the opinion of the majority is sound, for the reasons already given. The case was a very hard one for the buyers of the goods, but the principles that must decide it were considered too strong for the equities of the case. *Kreeft v. Thompson*, L. R. 10 Exch. 274. In that case the master had not been notified by the charterers what sort of bill of lading he was expected to sign, further than the charter party itself might inform him. But this is immaterial, because the decision turned upon the right of the shipper to dictate the terms upon which he would deliver his goods, which would be the same, though the charterers themselves had been present. They could not have accepted in part and rejected in part.

But if we grant that the property had once passed to the charterers, can the master be held to pay as damages for delivering the bill of lading to the shipper, a sum of money which the libellants have paid to the shipper? The latter could not by obtaining such a document revest the property in himself, or transfer a good title to one claiming under him, even in good faith. *Ogle v. Atkinson*, 5 Taunt. 759; *Stanton v. Eager*, 16 Pick. 468; *Kreeft v. Thompson*, L. R. 10 Ex. 274.

The bill of lading, then, would be waste paper as against the libellants, though it might give the shipper the means of deceiving others. Where, then, was the legal compulsion upon the libellants to accept the draft? If Hudgins had retained actual possession of the cargo, the payment would have been compulsory; but if he had only a paper title which was worthless, can it be so considered? A slight duress or obstruction might be enough, as between the party exacting the payment, and him who makes it, to deprive the payment of its voluntary character, and to warrant an action of assumpsit, to recover it back. The question is whether a third person has not a somewhat different position; whether if the master was wrong in giving this bill of lading, he should be held liable for damages which are not the legal and natural consequence of his act? Those natural consequences would seem to be the possible injury to third persons, who should advance money on the bill of lading, in ignorance of its invalidity; and I am not at all prepared to say that a master might not be liable in tort, in some cases, for damage of that character. So far as the shipper is concerned, the master is presumed to know that his bill of lading cannot avail him against the true owner; though for any expense or trouble to which the latter might be put to vindicate his title, there might be a liability. None such were offered in this case; the libellants yielded to a demand which could not be enforced, wisely perhaps, but still not under a strict necessity. As, however, I consider the first point a clear one against the libellants, I do not decide this.

LIBEL DISMISSED WITH COSTS.

Contract—Consideration—Promise not to expose Immoral Conduct.

BROWN v. BRINE, EXECUTOR.*

High Court of Justice, Westminster Hall, Exchequer Division, November 15 and 26, 1875.

To an action on a bond against the defendant as executor he pleaded for a defence on equitable grounds that before the making of the bond the plaintiff had seduced and committed adultery with the wife of the defendant's testator, and that after the making of the bond it was agreed between the testator and the plaintiff that, in consideration that the testator would not expose and make public the conduct of the plaintiff with regard to the said seduction and adultery, the plaintiff would not enforce or sue on the bond. Held, on demurrer, that there was no valid consideration to support the alleged promise of the plaintiff, and that the plea was therefore bad.

The action was brought by the plaintiff against the defendant as executor of Henry William Brine deceased.

The declaration was on a bond made by the deceased.

The defendant, for defence on equitable grounds, pleaded that before the making of the said bond in the declaration mentioned, by the said Henry William Brine deceased, the plaintiff had seduced and committed adultery with the wife of the said Henry William Brine, and that after the making of the said bond, and before the commencement of this suit, the

*From the report in 24 Weekly Reporter, 177.

plaintiff promised the said Henry William Brine, and it was mutually agreed by and between them, that if the said Henry William Brine should not and would not expose and make public the conduct of the plaintiff with regard to the said seduction and adultery he, the plaintiff, would not enforce payment of the penal sum in the said bond or any part thereof, or any money thereby secured, or sue for the same, and the defendant says that in pursuance and performance of the said agreement he, the said Henry William Brine deceased, did not, during his lifetime, expose or make public the conduct of the plaintiff with regard to the said seduction and adultery, but, relying upon the promise of the plaintiff, faithfully performed his part of the agreement, nor has the defendant since the death of the said Henry William Brine, and while he has been such executor as aforesaid, exposed or made public the said conduct of the plaintiff.

Demurrer and joinder in demurrer.

Kingdon, Q.C., in support of the demurrer, cited *Gibbs v. Hume*, 10 W. R. 38.

Edwards, Q.C. (*Goddard* with him), *contra*, cited *Hunt v. Hunt*, 10 W. R. 215; *Nash v. Armstrong*, 9 W. R. 782, 10 C. B. N. S. 259.

Cur. adv. vult.

Nov. 26.—*KELLY, C.B.*, now delivered the following judgment:—I am of opinion that the plaintiff is entitled to the judgment of the court. The consideration for the promise, as alleged in the plea, is that the deceased would not expose and make public the commission of the crime of adultery which the plaintiff had committed with his wife. I think that it is the breach of a moral duty to declare a man guilty of a crime unless upon a justifiable occasion. Such a declaration or statement in writing, even if true, would be a libel, and would subject the author of it to an indictment, unless the publication could be shown to be lawful as having been made upon a justifiable occasion, or in the ordinary course of a prosecution for an offense against the law. And if this be so, inasmuch as the publication, not upon any justifiable occasion, that the plaintiff had been guilty of adultery would have been a breach of a moral duty by the deceased, I am of opinion that the forbearance to commit such a breach of duty cannot be made the consideration for a promise either to pay a sum of money or release a debt. The consideration therefore failing, the promise is void, and the plea is bad in law.

The case before Vice-Chancellor Wood shows that a bond conditioned for the payment of a sum of money in consideration of giving up and abandoning a petition for a divorce, on the ground of adultery, cannot be enforced by the obligee. This shows that a forbearance to sue for a divorce, with justifiable cause being no consideration, *a fortiori* such forbearance, cannot support a promise.

The plaintiff is, therefore, entitled to the judgment of the court.

CLEASBY, B.—I am of the same opinion, and will only add a few words. The consideration to give up this bond must either be a benefit to the promisor or some prejudice to the promisee. Now, what is the consideration which is said in this case to be a benefit to the promisor? It is the benefit derived from the defendant's keeping certain events secret, which is the same thing as depriving the public of the knowledge of the truth, and so depriving them of the opportunity of taking the steps they would take if they knew of his conduct. It is only, therefore, a benefit to the plaintiff so far as it would be material to the public to know it. If it is wholly immaterial, then there is no consideration at all; if it is material, the public ought not to be deprived of it as a matter of bargain which is to be held to confer a legal right.

The case of *Pool v. Bousfield*, 1 Camp. 55, has some bearing on the validity of such a consideration. In that case the consideration was the not further presenting an application to the court to compel an attorney to answer the matters in an affidavit. That case, though by no means in point, has this resemblance to the present, that the object was to prevent the disclosure of certain matters affecting the character of the promisor, and although, so far as regards any redress which the plaintiff might look for from the application, the agreement was perfectly legal, Lord Ellenborough held the agreement to be corrupt and invalid. It is no doubt an important feature in that case that the defendant was an attorney, and therefore an officer of the court, and I only refer to it as bearing some resemblance to the present case. The conclusion I have arrived at in the case we are now considering is founded on general principles, the application of

which to particular cases is no guide. The plea is bad, and our judgment must therefore be for the plaintiff.

AMPHLETT B., concurred.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Coode, Kingdon & Cotton*, for *Thomas Flood*, Exeter.

Solicitors for the defendant, *Peacock & Goddard*.

Foreign Judgments—Partnerships.

HALL ET AL. v. LANNING ET AL.

Supreme Court of the United States, October Term, 1875.

1. Conclusiveness of Judgments of Sister States.—The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to enquiry, and in this respect the judgment of the court of another state of the American Union is to be regarded as a foreign judgment; nor does the record of such judgment estop the parties from demanding such enquiry; and the recitals of such record showing service of process may be contradicted and disproved. [*Acc.*, *Thompson v. Whitman*, 18 Wall. 457; *s. c.*, 1 CENT. L. J., 308; *Knowles v. Gas-Light Co.*, 19 Wall. 58; *s. c.*, 1 CENT. L. J. 311.]

2. Judgment against Partnerships—Effect of, upon Partner not Served.—A member of a partnership firm residing in one state can not, without his appearance or consent, be rendered personally liable in a suit brought in another state against him and his co-partners, although the latter be duly served with process, and although the law of the state where the suit is brought, authorizes judgment to be rendered against him. [*Acc.*, *D'Arcy v. Ketchum*, 11 How. 165.]

3. —. How after Dissolution of one Partner appearing for the Firm.—One partner can not, after a dissolution of the partnership, implicate his co-partner in suits brought against the firm, by voluntarily entering an appearance for him.

4. Judgment of Sister States—Effect as to Partners not served of Judgment against Partnership—Case in Judgment.—A suit was brought in New York against two defendants, as members of a partnership firm which had been dissolved. The record showed that an attorney appeared for both partners and defended on the merits, and that judgment was given for the plaintiffs. A suit was brought against one of the defendants, upon the record of the judgment, in the United States Circuit Court for the Northern District of Illinois. Held (reversing the judgment below), that the recitals in the record were not conclusive, but that the defendant should have been permitted to show that he had not been served with process in the original suit; that he had had no notice or knowledge of the suit, and that he had not authorized an appearance for him therein.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice BRADLEY delivered the opinion of the Court.

This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error. One of them, Lybrand, pleaded separately *nil tiel record*, and several special pleas questioning the validity of the judgment as against him for want of jurisdiction over his person. On the trial the plaintiff simply gave in evidence the record of the judgment recovered in New York, which showed that an attorney had appeared and put in an answer for both defendants, who were sued as partners. The answer admitted the partnership, but set up various matters of defence. The cause was referred and judgment given for the plaintiffs. This was the substance of the New York record. The plaintiffs gave no further evidence.

Lybrand then offered to prove that he, Lybrand, never was a resident or citizen of the state of New York; and that he had not been within said state of New York at any time since, nor for a long time before the commencement of the suit in which the judgment was rendered, upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the state of New York, or to enter his appearance therein, nor did he ever authorize any one to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in person; and that he knew nothing of the pendency of said suit in the said state of New York until the commencement of the present suit in this court; that said Lybrand was a partner in business with said J. Sherman Hall at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved and due notice thereof published some six months prior to the commencement of said suit in New York.

This evidence being objected to, was overruled by the court, which instructed the jury as follows: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings, and that they should return a verdict for the plaintiffs and against both defendants."

A bill of exceptions being taken to this ruling, the matter is brought here on writ of error.

The question to be decided, therefore, is, whether, after the dissolution of a co-partnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the state where the suit is brought and have not been served with process; and if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another state. We recently had occasion, in the case of *Thompson v. Whitman*, 18 Wall.

457, to restate the rule that the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to enquiry, and that in this respect the court of another state is to be regarded as a foreign court. We further held in that case that the record of such a judgment does not estop the parties from demanding such an enquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of *Knowles v. The Gas-Light Company*, 19 Wallace 58, we further held, in direct line with the decision in *Thompson v. Whitman*, that the record of a judgment showing service of process on the defendant could be contradicted and disproved.

It is sought to distinguish the present case from those referred to, on the ground that the relation of partnership confers upon each partner authority, even after dissolution, to appear for his co-partners in a suit brought against the firm, though they are not served with process and have no notice of the suit. In support of this proposition, so far as relates to any such authority after dissolution of the partnership, we are not referred to any authority directly in point, but reliance is placed on the powers of partners in general, and on that class of cases which affirm the right of each partner, after a dissolution of the firm, to settle up its business. But, in our view, appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may, undoubtedly, in his own defence, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question whether they were partners or not when the debt was incurred, as on that of the validity of the debt, would, as it seems to us, be carrying the power of a partner after a dissolution of the partnership to an unnecessary and unreasonable extent.

The law, indeed, does not seem entirely clear that a partner may enter an appearance for his co-partners without special authority even during the continuance of the firm. It is well known that by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to outlawry against him before he can prosecute the action, and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. 1 Chitty's Plead. 42; Tidd's Pract. chap. 7, p. 423, 9th ed. A shorter method by *distringas* in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbersome and dilatory proceeding should be necessary in the case of partners if one partner has a general authority to appear in court for his co-partners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted, but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually served. Further reference to this subject will be made hereafter.

It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his co-partners, during the continuance of the firm, has been asserted by several text writers. Gow on Partnership, 163; Collyer on Partn., § 441; Parsons on Partn. 174, note. But the assertion is based on somewhat slender authority. We find it first laid down in Gow, who refers to a dictum of Sergeant Dampier, made in the course of argument (7 T. R. 207), and to the case of *Morley v. Strombom*, 3 Bosanquet & Puller, 254, where the court refused to discharge partnership goods taken on a *distringas* to compel the appearance of an absent partner, unless the partner who was served, would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear in suits for his co-partner; for in a subsequent case (*Goldsmith v. Levy*, 4 Taunt. 299), a *distringas*, issued under the same circumstances, was discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his co-partner. These seem to be the only authorities relied on.

But, as said before, these authorities, and one or two American cases which follow them, refer only to appearances entered whilst the partnership was subsisting; and, it is pertinent also to add that they only refer to the validity and effect of judgments in the state or country in which they are rendered.

Domestic judgments, undoubtedly (as was shown in *Thompson v. Whitman*), stand, in this respect, on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside, but the defendant will, sometimes, be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. *Denton v. Noyes*, 6 Johns. 296; *Grazebrook v. McCreedie*, 9 Wend. 437. But even in this case, it is the more usual course to suspend proceedings on the judgment and allow the defendants to plead to the merits and prove any just defence to the action. In any other state, however, except that in which the judgment was rendered (as decided by us in the cases before referred to), the facts could be shown, notwithstanding

standing the recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person.

So, it may well be, that where appearance has been entered by authority of one of several co-partners on behalf of all, the courts of the same jurisdiction will be slow to set aside the judgment unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process or appearance of the defendant; as, in foreign attachments, process of outlawry and proceedings *in rem*.

Another class of cases is that of joint debtors, before alluded to. In most of the states legislative acts have been passed, called joint-debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors, or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding, on the latter. Under the joint-debtor act of New York, it was formerly held by the courts of that state that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter into the merits and show that he ought not to have been charged.

The validity of a judgment rendered under this New York law, when prosecuted in another state, against one of the defendants who resided in the latter state and was not served with process, though charged as a co-partner of a defendant residing in New York, who was served, was brought in question in this court in December term, 1850, in the case of *D'Arcy v. Ketchum*, 11 Howard, 165. It was there contended by the Constitution of the United States, and the act of congress passed May 26, 1790, in relation to the proof and effect of judgments in other states, the judgment in question ought to have the same force and effect in every other state which it had in New York. But this court decided that the act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that by international law, a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, where the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force.

This decision is an authority which we recognized in *Thompson v. Whitman*, and in *Knowles v. Gas-Light Company*, before cited, and which we adhere to as founded on the soundest principles of law. And in view of this decision it is manifest that many of the authorities which declare the effect of a domestic judgment, in cases where process has not been served on one or all of the defendants, and where those not served have not authorized any appearance, and do not reside in the state, can have little influence as to the effect to be given to such a judgment in another state.

It appeared to be settled law, therefore, that a member of a partnership firm, residing in one state, can not be personally liable in a suit brought in another state, against him and his co-partners, although the latter be duly served with process, and although the law of the state where the suit is brought authorizes judgment to be rendered against him. The case stands on the simple and naked question whether his co-partners after the dissolution of the partnership, can without his consent and authority implicate him in suits brought against the firm, by voluntarily entering an appearance for him. We are of opinion, that no authority can be found to maintain the affirmative of this question.

In the case of *Bell v. Morrison*, 1 Peters, 351, this court decided, upon elaborate examination, that after a dissolution of the partnership, one partner can not by his admissions, or promises, bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt.

It is well settled by numberless cases, that, even before dissolution, one partner can not confess judgment, or submit to arbitration so as to bind his co-partners. *Stead v. Salt*, 3 Bing. 101; *Adams v. Bankart*, 1 Cramp. Mee. & R. 681; *Karthaus v. Ferrer*, 1 Peters, 222, and cases referred to in *Story on Partn.* § 114; 1 Amer. Lead. Cas. 5th ed. 556; *Freeman on Judgments*, sec. 232; *Collyer on Part.* secs. 469, 470 and notes; *Parsons on Partn.* 179, note.

It is equally well settled that, after dissolution, one partner can not bind his co-partners by new contracts or securities, or impose upon them a fresh liability. *Story on Partn.* § 322; *Adams v. Bankart*, *qua supra*.

Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when perhaps he has a good defence to it. On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his co-partners in a suit brought against the firm. It may, in some instances, be convenient that one partner should have such authority; and when such authority is desirable it can easily be conferred either in the

articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread of impending evil, than that of accepting service of process for their former associates, and of rendering them liable, without their knowledge, to the chances of litigation which they have no power of defending.

Few cases can be found in which the precise question has been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a partner to appear for his co-partners during the continuance of the partnership, has been discussed. The point was raised in *Phelps v. Brewer*, 9 Cushing, 390, but the court being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it.

In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all, was also inoperative as against the other partners. *Duncan v. Tombeckbee Bank*, 4 Porter, 184; *Demott v. Swaim's Adm.* 5 Stewart & Porter, 932.

In the case of *Loomis & Co. v. Pearson & Michael*, Harper's South Carolina Reports, 470, it was decided that after a dissolution of partnership, one partner can not appear for the other; although it is true that it had been previously decided by the same court in *Haslet v. Street et al.*, 2 McCord, 311, that no such authority exists even during the continuance of the partnership.

But the absence of authorities, as before remarked, is strong evidence that no such power exists.

In our judgment the defendant, Lybrand, had a right, for the purpose of invalidating the judgment as to him, to prove the matter set up by him in his offer at the trial. And for the refusal of the court to admit the evidence, the judgment should be reversed with directions to award a venire de novo.

Judgment reversed.

Writs of Error from Supreme Court of United States to State Courts.

ATHERTON, EX'R v. FOWLER ET AL.

Supreme Court of the United States, Nos. 647 and 648, October Term, 1875.

1. Writs of Error from Supreme Court of United States to State Courts.—Such writs run only to the highest court in which a decision in the suit could be had; they operate upon the court, and not upon the parties; the citation brings in the parties.

2. —. What Judgments are Final.—A judgment is final within the meaning of the statute giving this writ (R. S., § 709) which, while remanding the record to the court below prohibits any further proceedings therein.

3. —. Mode of Compelling Return of Record.—If the record can not be obtained by sending the writ to the highest state court in which a decision could be had, the Supreme Court of the United States will, in order to obtain it, send a writ to the inferior state court in which it is lodged; or, it will send to the highest court, and seek through its instrumentality to obtain it from the inferior court.

4. —. Amendment of Writ.—Under § 1005, R. S., a writ of error may be amended by inserting the proper return day.

5. —. Teste of Writ of Error.—It is no objection to a writ of error that it bears teste on the day of its issue.

In error to the Supreme Court of the State of California. On motion. Mr. Chief Justice WAITE delivered the opinion of the court.

The plaintiffs in error claimed title to the hay in controversy in this case, in consequence of alleged rights acquired under the act of Congress, passed March 3, 1863, entitled "An act to grant the right of pre-emption to certain purchasers on the 'Soccol ranch,' in the state of California." 12 Stat. 808. The decision of the state court was against their title. This presents a question within the jurisdiction of this court.

The judgment of the supreme court is the final judgment in this suit, within the meaning of the act of Congress. Rev. Stat. 709. It reversed and modified the judgment below and did not permit further proceedings in the inferior court, if the defendants consented to the modification directed as to the amount of damages. This consent has been given, as the record shows, and the judgment of the court below is the judgment which the supreme court directed that court to enter and carry into execution. The litigation was ended by the decision of the supreme court. No discretion was left in the court below if the required consent was given.

The writ of error was properly directed to the supreme court of the state. We can only re-examine the "final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had." Rev. Stat. sec. 709. For the purpose of a re-examination, we require the record upon which the judgment or decree was given, and we send out our writ of error to bring it here. That writ is to operate

on the court having the record, and not upon the parties. *Cohens v. Virginia*, 6 Wheat. 410. The citation goes to the parties and brings them before us. The writ of error, therefore, is properly "directed to the court which holds the proceedings as part of its own records and exercises judicial power over them." *Hunt v. Palao*, 4 How. 590. If the highest court of the state retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had. We may not be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be accomplished, but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want.

But in some of the states, as, for instance, New York and Massachusetts, the practice is for the highest court, after its judgment has been pronounced, to send the record and the judgment to the inferior court, where they thereafter remain. If in such a case our writ should be sent to the highest court, that court might with truth return that it had no record of its proceedings, and, therefore, could not comply with our demand. Upon the receipt of such a return, we would be compelled to send another writ to the court having the record in its possession. It has been so expressly decided in *Gelston v. Hoyt*, 3 Wheat., 246, and *McGuire v. Commonwealth*, 3 Wall. 382. So, too, if we are in any way judicially informed, that under the laws and practice of a state, the highest court is no custodian of its own records, we may send to the highest court and seek through its instrumentality to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself. But if the highest court is the legal custodian of its own records and actually retains them, we can only send there. This, we think, has always been the rule of practice, notwithstanding Mr. Justice Story, in delivering the opinion of the court in *Gelston v. Hoyt*, said that the writ might be "directed to either court in which the record and judgment on which it is to act may be found." 3 Wheat. 304. This was in a case where the judgment had been rendered in the Court of Appeals of New York, but after its rendition the record with the judgment had been sent down to the inferior court there to be preserved in accordance to the law and practice in that state. Strictly speaking, the record can not be found in two courts at the same time. The original record may be in one and a copy in another, or one court may have the record, and another the means of making one precisely the same in all respects, but the record proper can only be in one place at the same time.

In *Webster v. Reid*, 11 How., 457, the general language of Mr. Justice Story in *Gelston v. Hoyt* was somewhat limited; for in stating the ruling of the court in that case, Mr. Justice McLean gives it as follows: "The writ of error may be directed to any court in which the record and judgment on which it is to act may be found, and if the record has been remitted by the highest court and to another court in the state, it may be brought by writ of error from that court." To the same effect is *McGuire v. Commonwealth*, 3 Wall. 386. That was a case from Massachusetts. The suit was pending in the superior court of that state, and after verdict, but before judgment, certain exceptions were sent up to the supreme judicial court for its opinion. That court subsequently sent down its rescript overruling the exceptions, and thereupon final judgment was entered in the superior court upon the verdict. This was according to the law and practice in Massachusetts, and the effect was to leave the entire record in the inferior court. Upon this state of facts, this court held that the judgment in that case was the judgment of the superior court, and that that court was the highest court in which the decision of the suit could be had, and, therefore, the only court to which the writ could go. But it was also held, that if the supreme judicial court had rendered the final judgment and had sent the judgment to the superior court and with the judgment had sent the record, the direction of the writ to the superior court would have been proper. *Green v. Van Buskerk*, 3 Wall., 450, was also a New York case, and is to be considered in the light of the peculiar practice in that state. The record had been sent from the court of appeals to the supreme court.

The rule may, therefore, be stated to be, that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court for safe keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court and send them to us, no writ need go to the inferior court. But if it fails to do this, we may, ourselves, send direct to the court having the record in its custody and under its control. So, too, if we know that the record is in the possession of the inferior court and not in the highest court, we may send there without first calling upon the highest court. But if the law requires the highest court to retain its own records and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court being the only custodian of its own records is alone authorized to certify them to us.

In this case our writ went to the supreme court, and in obedience to its command, that court has sent us its record. There is now no need of a further writ, even if the practice in California permitted the transmission of records from the supreme court to the inferior courts.

But such, as we understand, is not the practice. The supreme court is there the sole custodian of its own records. Cases go there upon a transcript of the proceedings in the court below. This transcript is retained in the supreme court and is the foundation of the proceedings there. The transcript is without doubt a copy of the proceedings in the court below, but that does not make the record below the record above. The court above acts only upon the transcript, and from that its record is made.

The writ of error may be amended under the authority of sec. 1005 of the Rev. Stat. by inserting the proper return day. It is no objection to the writ that it bears teste on the day of its issue. Rev. Stat. sec. 912. The motion to dismiss is denied.

Correspondence.

COMMERCIAL PAPER—DISHONOR OF INTEREST—FRAUD.

BLOOMINGTON, ILL. Jan. 18, 1876.

EDITORS CENTRAL LAW JOURNAL:—In the note to the case of the Rock Island Nat. Bank v. Nelson, reported in the CENTRAL LAW JOURNAL of Jan. 7th, it is stated that, "the fact that there is interest due on a note at the time of the endorsement, does not put the purchaser on enquiry, nor is it equivalent to purchase after maturity." The cases cited in support of this, are *Boss v. Hewitt*, 15 Wis., 260, and *Bank v. Kerby*, 108 Mass., 497. These cases undoubtedly support this rule; but though the question does not seem to be often before the courts, there are two other cases which hold a directly opposite doctrine, which it may be well to consult, and which I cite as worthy of consideration.

In the case of *First Nat. Bank, St. Paul v. Co. Com. Scott Co.*, 14 Minn. 77, *Wilson C. J.* says: "The fact that it appeared upon the face of the bonds, that the interest for several years was overdue and unpaid, was, we think, a circumstance of suspicion sufficient to put the plaintiff upon his guard. The bonds were thus dishonored on their face. The interest, equally with the principal, is a part of the debt which they were instructed to secure, and it does not seem to us material whether the whole, or only a part of the debt was overdue."

Newell v. Gregg, 61 Barbour, 263, is even more in point, that interest overdue and unpaid and not endorsed on the note, is a circumstance which dishonors the paper as to both principal and interest. The question was here raised in a suit concerning a promissory note, made payable two years after date, interest payable annually, and assigned after the first year's interest was overdue and unpaid. The court held, where a note is for the payment of money at a specified time, with interest payable annually, that payment of interest annually is as much a part of the agreement as to pay the principal. It is a portion of the debt; and if, when the note is sold to a third person by the payee, a year's interest is past due, the note is then dishonored.

All these cases seem to have been decided without precedent excepting, indeed, the Minnesota case, which seems to have followed the 51st Barbour. In both the cases cited by M. A. L., the court speaks of the dearth of authorities. The difference of opinion, then, which is here indicated, arose from difference in reasoning upon general principles. Upon examination it will be found that in *Boss v. Hewitt* and *Bank v. Kirby*, *supra*, the court maintains that the interest is only an incident to the debt; and that the maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due. In the cases in 51 Barbour and 14 Minn., *supra*, we find this language: "The interest, equally with the principal, is a part of the debt;" and in a note with the interest payable annually, the payment of interest, as nominated, is as much a part of the agreement as to pay the principal. It is a portion of the debt."

The authorities on both sides are eminently respectable and worthy of credit, and seem to have established the law in the respective states where the courts have spoken.

M. A. L., in the same note, in referring to the rule concerning commercial paper in the state of Illinois, says: "The Supreme Court of Illinois carries the doctrine of *Gill v. Cubitt*, to extreme length, requiring the purchaser of a note to exercise even greater diligence than the maker." The cases cited, *Taylor v. Atchison*, 54 Ill. 196; *Sims v. Bice*, 67 Ill. 88, do not support this doctrine, except by mere dicta; nor is this the rule in Illinois. The defence in both the above cases was made under a special provision of our statute, that "if any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid (promissory notes, etc.), such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument." Rev. Stat. 1874. The only question before the court was as to the sufficiency of the evidence to sustain the plea of "fraud and circumvention." One might well infer, however, from those cases, that the court would sustain the rule in the case of *Gill v. Cubitt*, whenever the question was properly brought before them. All doubts on this point are now set at rest, at least for the time, by the decision of the court in the case of *Comstock v. Hannah*, reported at length in 7 Leg. News, 358. The court quotes from the opinion of Lord Denmore in the case of *Goodman v. Harvey*, 4 Ad. & E. 870; *Goodman v. Simonds*, 20 How. 343, and several others of like import, and, adopting the language there used gives the opinion of the court as follows: "We accept the doctrine of these cases as correct in principle, and the one sustained by the great weight of authority." "We find nothing in the previous decisions of this court which would conclude us from adopting, what upon investigation we are satisfied is the correct doctrine in principle, and the prevailing rule of law."

The rule as sustained by this decision is given in the head-note as follows: "A party who purchases commercial paper before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a valid title; suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the purchaser, at the time of the transfer will not defeat the title. That result can only be produced by bad faith on his part." C. D. M.

Notes and Queries.

RIGHT OF DEBTOR TO DISPOSE OF EXEMPT PROPERTY.

CARLYLE, ILL., January 20, 1876.

EDITORS CENTRAL LAW JOURNAL:—If "Enquirer" (*ante* p. 14) from Chicago, Illinois, will look at the cases of *Vaughan v. Thompson*, 17 Ill. p. 78, and *Cole v. Green*, 21 Ill. p. 104, he will find that the Supreme Court of Illinois have decided his question. They say that a debtor may sell, mortgage or exchange property exempt by law without subjecting it or its equivalent to execution.

Yours, etc.,

G. VAN HOOREBEKE.

EXEMPTIONS OUT OF PARTNERSHIP ASSETS.

KANSAS CITY, MO., January 12, 1876.

EDITORS CENTRAL LAW JOURNAL:—Can one partner of a firm which is insolvent claim his legal exemption as a head of a family out of the partnership effects as against partnership creditors, under section 11, chapter 160, General Statutes of Missouri? Section 11 reads thus: "Each head of a family in lieu of the property mentioned in 1st and 2d subdivisions of the next preceding section, may select and hold exempt from execution, any other property, real, personal, or mixed; or debts and wages, not exceeding in value \$300 in amount." There is quite a division among attorneys here as to whether or not a partner can do so. I would be glad to hear from any one.

Yours, etc.,

R.

ANSWER.—The following cases support the conclusion that the operation of homestead and exemption laws extends to partnership assets: *Ratliff v. Wood*, 25 Barb. 52; *Hoyt v. Van Alstyne*, 15 Barb. 568; *Stewart v. Brown*, 37 N. Y. 350; *Servante v. Rusk*, 43 Cal. 238; *Newton v. Howe*, 29 Wis. 531; *West v. Ward*, 26 Wis. 579; *In Re Young*, 3 Nat. Bank Reg. 111; *Ex parte Rupp*, 4 Nat. Bank Reg. 25; *In Re McKercher*, 8 Nat. Bank Reg. 409; *In Re Richardson*, 7 Chicago Legal News, 62; s. c., 11 Nat. Bank Reg. 114. See also *In Re Parks*, 9 Nat. Bank Reg. 270. The following cases support a contrary conclusion: *Estate of Delaney*, 37 Cal. 176; *Kingsley v. Kingsley*, 39 Cal. 665; *Clegg v. Houston*, 1 Philadelphia, 352; *Gilman v. Williams*, 7 Wis. 329; *Wright v. Pratt*, 31 Wis. 99; *Pond v. Kimball*, 101 Mass. 105; *In Re Price*, 6 Nat. Bank Reg. 400; *Guptil v. McFee*, 9 Kansas, 30; *Burns v. Harris*, 67 N. C. 140; *Bensall v. Comly*, 44 Penn. Stat. 442, 447; *In Re Blodgett*, 10 Nat. Bank Reg. 145; *In Re Haefer*, 1 Nat. Bank Reg. 147; *Amphlett v. Hibbard*, 29 Mich. 298. It is thus seen that the conclusions at which the courts have arrived under various statutes, including the 14th and 36th sections of the bankrupt law, are irreconcilably in conflict and it would hence be idle to conjecture what view the Supreme Court of Missouri would take of the statute above quoted. These statutes have generally been construed liberally, to advance the beneficent purposes of the legislature; but even a liberal construction of a statute can not extend so far as to repeal the common law in a particular where the fair purport of the statute itself does not have that effect. It may be said on the one hand that the statute furnishes no intrinsic evidence that the legislative mind extended to the case of partnership assets; and to this it may be replied that legislatures are obliged to declare laws in general terms, and that the legislative intent can not be expected to take in every possible question that may arise under a statute; and that in cases where there is fair room for debate, the general spirit and policy of the law should govern in its construction. This being so, it seems to us that the statute above quoted ought to be held to extend to partnership assets.—Ed. C. L. J.

Book Notices.

COPP'S PUBLIC LAND LAWS.—Public Land Laws passed by Congress from March 4, 1869, to March 3, 1875, with the Important Decisions of the Secretary of the Interior and Commissioners of the General Land Office, the Opinions of the Assistant Attorney-General, and the Instructions issued from the General Land Office to the Receivers-General and Registers and Receivers during the same Period. By HENRY N. COPP, of the General Land Office, Editor of "Copp's Mining Decisions," and Proprietor of "Copp's Land-Owner." Washington: Published by the Compiler, 1875, pp. xv. 953.

The title of this work sufficiently indicates its scope. It is intended to take up the subject where it was left by previous compilations in 1870, and to bring it down to April, 1875, the beginning of the second volume of *Copp's Land-Owner*, a monthly publication. Several important decisions of a later date have, however, been included. All branches of the public land system are presented, except mining claims, which are made the subject of a separate volume. The work is divided into three parts: 1. Such portions of the Revised Statutes as relate to the subject under consideration. 2. Land laws passed by Congress from March 4, 1869, to March 3, 1875, inclusive. 3. Decisions, opinions and instructions. This last division comprises more than three-fourths of

the volume. The volume has an index 124 pages in length, each of the three parts being indexed separately. We should suppose that a consolidated index to the entire work would have been better. Others, however, may think differently. Want of familiarity with the subject prohibits us from venturing any critical observations upon the merits of the work. Turning, however, to a subject embraced in it to which we have given some study, we find a full collection of decisions and instructions relative to the obtaining of titles under the homestead laws passed by Congress—a feature which makes the volume especially valuable to the writer. The value of such a compilation depends upon the judgment which has been exercised in excluding those matters of minor importance which it was necessary to exclude, and in the care and fidelity with which the records which it gives have been transcribed and printed. Mr. Copp appears to have enjoyed unusual facilities for obtaining copies of documents in the public offices, and seems to have had the advantage of the advice of several eminent lawyers residing at the national capital; and we do not doubt that this volume will be found necessary to the library of every land-lawyer.

OPINIONS OF ATTORNEYS-GENERAL. VOL. XIV. Official Opinions of the Attorneys-General of the United States, advising the President and Heads of Departments in Relation to their Official Duties, and Expounding the Constitution, Treaties with Foreign Governments and with Indian Tribes, and the Public Laws of the Country. Edited by A. J. BENTLEY, Esq. Volume XIV. p. ix., 755. Published by Authority of Congress. Washington, D. C.: W. H. & O. H. Morrison. 1875.

This volume contains the opinions of Hon. George A. Williams, of Oregon, together with opinions given by Hon. Benjamin H. Bristow of Kentucky, Solicitor-General and Acting Attorney-General; those of Hon. Samuel F. Phillips, of North Carolina, Solicitor-General and Acting Attorney-General, and those of Hon. Clement Hugh Hill, of Massachusetts, Acting Attorney-General. No doubt much curious and interesting matter could be extracted from this single volume by one having the requisite leisure, which we have not. The ablest opinion of Mr. Williams with which we are acquainted (and it was an able opinion) was that given in the case of *Baxter v. Brooks*, rival claimants to the office of governor of Arkansas, (p. 394); and the one concerning which he and the American bar ought, perhaps, to feel most humble, is that given in the *Virginian* case, (p. 340), which in effect holds that a piratical craft may not be overhauled by a vessel of the nation against whom her piratical acts are intended, because she chooses to disguise her character by carrying the American flag. We expressed our views on this as a legal question at the time (1 CENT. L. J. 303) and shall not reargue the question now.

The index to this volume is very good, but is still susceptible of improvement. It affords us occasion to make one observation in regard to the making of indexes to law books, and that is, that matter should never be indexed under such general titles as *CONTRACTS*, *CRIMES*, *EVIDENCE*, etc., unless it is found impracticable to place it under special titles. To illustrate this, we may cite the entry which we find in this index under the title "*CRIME*." It reads as follows: "Where a portion of the crew of the steamer *Edgar Stewart* forcibly displaced the master thereof from command and took possession of the vessel,—*held*, that this did not constitute the offence of piracy, but of mutiny," etc. Now it is obvious that this entry might better have been placed under *PIRACY* or *MUTINY*, with appropriate cross-references from other titles. Again, we note a deficiency of cross-references, although a great many are made use of. Thus, the entry from which we have just quoted concludes as follows: "They may be tried therefor in any district into which they are first brought." Now it is obvious that in a complete index, this proposition would either have been placed under the title *VENUE*, or that a reference would have been made to it from that title; but neither has been done. It is much easier, however, to criticise an index than to make a good one, and this is no one doubt fully up to the average.

WALKER AND BATES' OHIO DIGEST.—Ohio Digest: Containing all Reported Cases to the year 1875. By J. BRYANT WALKER and CLEMENT BATES. Two Volumes. Roy. 8vo. pp. XIII, VII, 1703. Cincinnati: Robert Clarke & Co. 1875.

Judge Walker, the senior author of this work, died while the work was in progress, December 30, 1874, in the 34th year of his age. He was the son of the celebrated author of the *Introduction to the Study of the American Law*, an edition which was published under his supervision. He also annotated the *Municipal Code of Ohio*, and, for two years previous to his death, filled the Chair of Equity in the law school of Cincinnati College. He had, also, at one time, held the position of Judge of the Superior Court of Cincinnati.

The death of Judge Walker devolved the chief share of the preparation of this work on Mr. Bates. From such a hasty examination of it as we can take time to make, we think he has fairly earned the congratulations of the bench and bar of Ohio. We can not be expected to pass a critical judgment upon the manner in which the digesting, or abstracting of points and principles decided, has been done. This would involve the reading of many cases, a task which would be as tedious and as expensive as it might prove unprofitable. But we have always had a theory as to the manner in which a digest ought to be built up and arranged, after the work of abstracting the cases has been finished. Our notion is that each abstract ought to be placed under the title and sub-division deemed most appropriate, and that it should be specifically referred to from every other title under which an intelligent searcher might reasonably

be expected look for it. The fact which now impresses us and to which it is but just that we should call particular attention, is that this is the only digest which we have ever used, and we believe that it is the only existing American digest, where this has been fully accomplished. We are quite ready, after an examination of these volumes, to credit the statement of Mr. Bates that these subsidiary entries, the cross-references, outnumber the main entries two to one. And the concession of this fact carries with it, to the mind of the writer of this notice, a strong argument in favor of the thoroughness and fidelity with which the work has been done. For the writer of this notice spent over a year on a work of this kind (which has never seen the light), on the precise plan on which this has been completed; and it was found, on an average, that each abstract required to be entered three times, once in chief and twice referred to from other titles. Mr. Bates frankly confesses that "unquestionably, this work contains many deficiencies." This may well be. It would be almost a miracle if it did not contain many sins of omission and commission. But the patient diligence which has succeeded in bringing to such perfection the feature just alluded to, has disarmed criticism in advance, and atoned for a multitude of sins. Besides the general table of cases, it has an exhaustive table of cases criticised, overruled, etc. A large portion of this important branch of the work was, we are informed, done by J. D. Macneale, Esq., of the Cincinnati bar. Another feature of great value is a complete chronological list of such Ohio statutes as have been judicially construed in any of the volumes of reports embraced in this digest, the name of each statute having subjoined to it the names of the cases in which it has been expounded.

The work is well printed, solid, without leading or stuffing. The full catch-words in bold type and in italics will promote easy search and reference. Altogether, these volumes have the appearance of being a first-class American digest, and such we have no doubt they will be found to be after that use which can alone furnish a satisfactory test of their merits.

Recent Reports.

FIFTEENTH AMERICAN REPORTS. The American Reports; containing all Decisions of General Interest decided in the Courts of Last Resort of the Several States, with Notes and References, by ISAAC GRANT THOMPSON. Vol. XV. Albany: J. D. Parsons, Jr., Publisher. 1874.

This volume has already been noticed in this JOURNAL, and we now refer to it again for the purpose of making the following citations from the head-notes of some of the cases, though the reporter's selection has been so judicious that no case in this volume is so unimportant as to be overlooked.

Negotiable Paper—Extension of Time of Payment—Consideration—Discharge of Sureties.—The holders of a promissory note which bore usurious interest agreed with the maker, in consideration that the maker would continue to pay the same interest, to extend the time for the payment of the principal "until the summer," and afterward "until the fall." *Held*, 1. That this was a promise to forbear for a definite time, to-wit, till June 1, and September 1, but, 2; that there was not a sufficient consideration for such promise, and that therefore the sureties on the note were not discharged though the promise was made without their knowledge. *Abel v. Alexander*, 270, 45 Ind. 523.

Same—Alteration of—Adding Words "with Interest."—Defendant endorsed a note in which the time and place of payment were left blank. The maker afterwards filled the blanks and added the words "with interest." In an action against the endorser, *held*, that the addition of the words "with interest" was an unauthorized alteration of the note, which discharged the endorser from liability. *McGrath v. Clark*, 372, and note, 375, 56 N. Y. 34.

Same—Joint Note—Liability of Several Makers.—Plaintiff lent to defendant and another \$250 each, and took their joint note for \$500. Defendant paid half the note and took a receipt "in full of his share of the note." *Held*, that he was still liable as surety for the other half. *Sterling v. Stewart*, 559, 74 Penn. St. 445.

Same—Erasure of Endorsement by Finder or Thief—Title of Purchaser from Thief.—Negotiable bonds, payable to order, and bearing the endorsement in blank of the payee, were lost or stolen. The finder or thief erased the endorsements, and offered them for sale to the defendant, representing himself to be the person named in them as payee, and being identified as such by a person known to the defendant. The defendant agreeing to purchase, the officer endorsed the bonds with the name of the payee, and received for them their market value. The erasure of the endorsements was so made as not readily to attract attention, and the defendant purchased in good faith and in the regular course of business. *Held*, that the defendant acquired no title as against the owner. *Colson v. Arnot*, 496, 57 N. Y. 253.

Insurance—Insurable Interest—Equitable Title.—Plaintiff conveyed lands to R., upon a verbal promise to R. to reconvey to plaintiff a life estate in the land. Plaintiff remained in possession. *Held*, that plaintiff had an insurable interest in the buildings on the land even before any reconveyance of the life estate. *Redfield v. Holland Purchase Ins. Co.*, 424, 56 N. Y. 354.

Statute of Frauds—Contract to Convey Land—Description of the Lands—Evidence.—In a written contract to convey real estate, the words "a house on Church street," are a sufficient description of the estate to satisfy the requirements of the statute of frauds; and the house

may be identified by parol evidence. *Mead v. Parker*, 110, 115 Mass. 413.

Same—Contracts for Sale of Real Estate not to be Performed within a Year.—The provision of the statute of frauds concerning contracts not to be performed within a year does not apply to contracts for the sale of lands; and therefore when one entered and made improvements on land under an oral agreement to pay for it and to receive a deed in two years; *held*, that a suit for specific performance would lie. *Fall v. Hazelregg*, 278, 45 Ind. 576.

Bank Directors—Liability of, for Loss or Conversion by Bank Officers of Special Deposits.—In an action against the directors of a bank which had become insolvent, to recover the value of bonds placed in the bank on special deposit, plaintiff alleged that said bonds had been wrongfully converted by the officers of said bank to the use thereof, of which fact defendants had notice, or could have had by the exercise of ordinary vigilance, from the books, etc., of the bank, and that said directors "did on various occasions declare dividends when the condition of the bank did not justify the same, and so appropriate to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiff's property." *Held*, on demurrer, that these facts constituted a good cause of action. *United Society of Shakers v. Underwood* 731. 9 Bush, Ky. 609.

Devise to One already Dead—Void Devise.—A testator devised all his real estate to his nephews A, B and C, "to be equally divided between them, to be held by them, their heirs and assigns forever," subject to a charge. There was no other or residuary devise of real estate in the will. A was dead, and the testator knew it when the will was made; *held*, that the devise to him was a void and not a lapsed devise, and that the one-third descended as intestate real estate to the heirs at law of the testator. *Doe dem. Hearn v. Cannon* 701. 4 Houst. Del. 20.

Restraint of Trade—Contract in—Consideration—Presumption.—Defendant sold to complainant his business of well-driving at G., and in consideration of the sale agreed "not to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving after" that date. *Held*, that the agreement would be construed to impose a restraint upon the defendant within such limits about G., as the business there located would naturally and reasonably embrace, and not such a general and unlimited restraint as to be void. *Hubbard v. Miller* 153, 27 Mich. 15.

Removal of Suit—When it may be had—Final Hearing.—A cause was tried upon its merits in a state court and, on appeal, the judgment was reversed and a new trial ordered. *Held*, that the defendants were not thereupon entitled to remove the cause into the Circuit Court of the United States. *Crane v. Reader* 223, 28 Mich. 527.

Replevin—Where Property is in Possession of Receiver.—The owner of a locomotive engine may maintain replevin for it against the agent of a railroad corporation, whose property is in the hands of receivers, without obtaining leave of the court appointing the receivers, if the corporation had no interest in the engine, although it is used on the railroad. *Hills v. Parker* 63, 111 Mass. 508.

Partnership—Dissolution of, by Death—Proceeds of Realty.—Two partners held, as tenants in common, land bought with money of the firm. One partner died and the other bought his interest in the land, assuming the debts of the firm. *Held*, that the purchase-money was to be distributed as real estate. *Foster's Appeal* 553, 74 Penn. St. 491.

Party Wall—Parol Contract to build—Contribution—Estoppel.—Plaintiff and defendant owning adjoining lots, entered into a parol agreement to jointly build a party wall, and in pursuance thereof built a portion of the wall, when defendant refused to proceed further. Whereupon the plaintiff, who had prepared materials and planned a building in reliance upon the performance of the agreement, proceeded to complete the wall after due notice to the defendant. *Held*, (1) that the parol contract having been partly executed, the parties were estopped from denying the existence of the easement thereby created, and (2) that plaintiff was not limited to an action for specific performance, but could recover from the defendant one-half the cost of the wall. *Rindge v. Baker* 475, 57 N.Y. 209.

Landlord and Tenant—Liability of Landlord for Condition of the Premises.—The lessor of a building is not, in the absence of fraud, or any agreement to that effect, liable to the tenant or others, lawfully upon the premises by his authority, for their condition, nor does he undertake that they are tenantable for the purposes for which they are apparently intended. *Jaffee v. Hartau* 438, 56 N. Y. 398.

Seduction Under Promise of Marriage.—Indictment for the seduction of the prosecutrix under the promise of marriage. Plea, that at the time of the alleged seduction defendant was lawfully married, whereof prosecutrix had notice. *Held*, that the plea was good. *Wood v. State* 664, 48 Ga. 192.

Municipal Corporation—Power of Legislature over—Can not Compel Local Improvements.—A statute created a board of park commissioners for a city, with power to select needful land to make contracts therefor, subject to ratification by the common council and by a vote of the citizens. Before any contracts were so ratified, the act was amended so as to authorize the board to "acquire by pur-

chase" the necessary lands, and to require the common council to provide money to pay therefor. *Held*, that mandamus would not be issued to compel the common council to raise the money, because the legislature could not compel a municipal corporation to contract a debt for local purposes against its will. *People ex rel. Board of Park Commissioners v. Common Council of Detroit* 202, 28 Mich. 223.

Limitation of Action—Fraud—When Action for, arises.—Plaintiff was induced to purchase certain lands by means of fraudulent representations made by defendant who had a mortgage thereon, that there was no other encumbrance, when in fact there was to defendant's knowledge another mortgage upon the premises. *Held*, that an action for the fraud accrued immediately upon the purchase, and that, therefore, an action brought more than six years thereafter, but within six years after an eviction under the mortgage, was barred by the statute of limitations. *Northrup v. Hill* 501, 57 N. Y. 351.

Same—Statute not suspended by an Unconstitutional Law.—The constitution of Georgia forbade the recovery of any debt, the consideration of which was slaves, or the hire thereof. The supreme court of the state decided that the provision was constitutional but, on appeal, the United States Supreme Court held that it was not constitutional. *Held*, that an action to recover such a debt was not taken out of the statute of limitation, by the fact that it could not have been successfully prosecuted before the decision of the Supreme Court of the United States. *Harris v. Gray* 684, 49 Ga. 585.

Liability of Railroad Company as Carrier of Animals.—In an action against a railroad company to recover for injuries done by one of the plaintiff's pair of horses to his mate, while being carried by the defendants, the defendants requested a ruling that if they used due care and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the horses, such as fright or bad temper, they were not liable; the judge refused this ruling, but ruled that if the horse was injured by his mate in an outburst of viciousness, quite unusual in horses worked together, the jury might find for the defendants. *Held*, that the defendants had good ground of exception. *Evans v. Fitchburg R. R. Co.* 19, 111 Mass. 142. See also *Louisville, etc., R. Co. v. Hedger* 740, 9 Bush, Ky. 645.

When Equitable Rights of Assignee will be protected.—A. B. having a policy issued by an insurance company on his property, payable, in case of loss, to a mortgagee, on which a total loss had occurred, executed and delivered to J. S., an attorney who held claims of M. N. and others against him, an order, by which he requested the company to pay to "J. S., attorney of M. N. and others," the balance due on the policy after paying the mortgagee; and in consideration thereof J. S. forbore to press the claims. The company, though having notice of this order, paid said balance to A. B. on his assurance that the order amounted to nothing. *Held*, that J. S. could maintain an action in the name of A. B. to recover the balance from the company. *Hall v. Dorchester Mutual Ins. Co.* 1, 111 Mass. 53.

Railway Damages for Expulsion of Passenger—Regulations requiring Exhibition of Tickets.—Plaintiff purchased a ticket on defendant's line from S. to R., and took passage on a train which went only a part of the way. The conductor on the train took up and retained the ticket, without giving any check or other evidence of a right to a passage on the next train. Plaintiff took the next train on defendant's line for R., and, when called on for his ticket, informed the conductor that the conductor of the previous train had retained it. The conductor thereupon demanded the fare, and, it being refused, ejected the plaintiff. *Held*, (1) that even if plaintiff was justified in his refusal, he could not recover exemplary damages, but (2) that plaintiff was not justified in such refusal: the wrongful taking of his ticket by the preceding conductor not exonerating him from a compliance with the rule requiring passengers to present a ticket or pay the fare. *Townsend v. N. Y. C. & H. R. R. Co.* 419, 56 N. Y. 295.

Attorney and Client—Attorney may release Attachment.—An attorney at law has authority, by virtue of his employment as such, to release before judgment an attachment of real estate. *Moulton v. Bowker* 72, 115 Mass. 36.

Fraud—Trustee ex Maleficio.—Defendant represented to plaintiff, who was the holder of an unrecorded deed of land on which an execution had been levied, that if she would allow him to buy the land at the sheriff's sale he would execute a writing before the land was bid off declaring that he bought it for her. Defendant accordingly bought the property, but refused to execute the writing. *Held*, that defendant was trustee for the plaintiff. *Wolford v. Harrington* 548, 74 Penn. St. 311.

Slander of Business.—Two sewing machine companies competed for a prize offered for the best sewing machine, and it was awarded to one of them; but the other caused to be published in the newspapers false statements that the prize had been awarded to it. *Held*, that an injunction would not be granted to restrain such publication. *The Singer Manufacturing Co. v. The Domestic Sewing Machine Co.* 674, 49 Ga. 70.

Bailment—Liability of Gratuitous Bailee.—The plaintiff, on the point of starting upon a long voyage, requested the defendant to buy a government bond and keep it for him. The defendant was to receive nothing for his services. The defendant bought the bond, and after keeping it a year, sent it by mail to the plaintiff's wife, and it was lost on

the way. Neither the plaintiff nor his wife requested the defendant to send the bond to her. *Held*, that the defendant was liable for the bond, without regard to the question of diligence on his part. *Jenkins v. Bacon*, 33, 111 Mass. 373.

Evidence.—In Action for Negligence.—Of Habits of Servant.—Action against a railroad company to recover damages for injuries to plaintiff caused by the negligence of its servants. *Held*, that evidence that the servant was drunk at the time, and that he was of intemperate habits, which were known to the agent of the company having power to employ and discharge such servants, was admissible in aggravation of damages. *Cleghorn v. N. Y. & H. R. R. Co.*, 375, 56 N. Y. 44.

Payment.—Counterfeit Money.—Duty of Receiver.—One receiving counterfeit money is bound to use due diligence in ascertaining its character and in notifying the giver, provided the latter was ignorant of its character and paid it in good faith. *Atwood v. Cornwall*, 219, 28 Mich. 336.

Action against Surgeons for Negligence.—Statute of Limitations.—A complaint charged that the defendants undertook as surgeons to set and heal plaintiff's arm which was broken, but that they so negligently conducted themselves in attempting so to do that the arm was rendered worthless. *Held*, that the cause of action was *ex contractu* and not *ex delicto*, and therefore only barred by the statute limiting actions on contracts. *Staley v. Jameson*, 285, 46 Ind. 159.

Mistake.—Of Law.—Every one is usually bound as if he had a knowledge of the law, whether he has it or not; but there is no rule which conclusively presumes such knowledge as a fact, where that fact is important. *Black v. Ward*, 162 and note, 171, 27 Mich. 191.

Criminal Trial.—Limiting Argument of Prisoner's Counsel.—Under the constitutional provision securing to persons accused of crime the privilege of counsel, it is an error for a judge presiding at a criminal trial to limit the prisoner's counsel to forty minutes for his argument. *Hunt v. State*, 687, 49 Ga. 255.

Damages.—In Action by Parent for Death of Son.—In an action by a father to recover damages for negligently injuring and causing the death of his son, eight years of age, *held*, that the plaintiff could recover only the expenses he had incurred for medical attendance, for his care in nursing, etc., and for the loss of service from the date of the injury to the time of the death. *Corington Street Railway Co. v. Packer*, 725, 9 Bush, Ky. 455.

Lateral Support.—The owner of a building erected on the line of his lot, can not by lapse of time acquire a prescriptive right to the lateral support of the adjacent soil. *Mitchell v. Mayor*, 609, 49 Ga. 19.

Legal News and Notes.

—THERE are 62 students in the St. Louis Law School, of whom 23 are in the Senior class.

—In a recent case Chief Justice Erle observed: "It is certainly an odd sort of estate—a fee simple in a profit a prendre."

SUPERVISOR of revenue Fulton, of Philadelphia, has been ordered to Chicago, with all the proofs against the conspirators. No compromise, is the motto.

CALIFORNIA proposes a law requiring banking corporations to expose in convenient places lists of their stockholders and the number of shares held by each.

—It is said that Ex-Attorney-General Williams has been retained as counsel for Gen'l Babcock, and will assist in conducting his trial, which is docketed for the thirty-first of this month.

—Miss Ella A. Martin has been admitted to the Illinois bar by the Supreme Court at Springfield. The *Legal News* says, "There are more women attorneys in Illinois than in any state of the Union."

—THE efforts of Stokes and his friends for his release noticed in our last, were, as we predicted, futile. Since they were made, a writ of *habeas corpus* was asked for, but refused. There seems to be no disposition on the part of the New York authorities to consider five years imprisonment too long for the commission of murder.

—RECOMMENDATION of the grand jury at Jacksonville, Fla.: "We find that there are three prisoners in the jail who have been there nearly two years for the pitiful sum of \$10 cost each. These prisoners have cost the county about \$900. We recommend that the city commissioners pay the fine, release the prisoners, and thereby save money for the county."

—As Mr. Henry C. Bowen recovered but \$1,000 in one of his libel suits, though he claimed to have suffered \$100,000 damages in each, he may be considered a very unfortunate man, as he has received no reparation for \$199,000 worth of damage to his reputation. We did not know it could be impaired to such an extent. If 'tis true, 'tis pity.

—WE are pained to note the death of Wm. M. Randolph, Esq., of the New Orleans bar. He was a lineal descendant of John Randolph of Roanoke, and studied law under John Marshall. He went to New Orleans twenty-five years ago, and has long been noted for his legal acumen, forensic ability, fine native qualities, and true gentility. His fellow-townsmen speak of him in terms of highest praise, and it will be difficult to fill his place or to forget him.

—FESTIVE New Yorkers have been moving the legislature to repeal the law prohibiting masquerade balls, and have at last succeeded to

the joy of the French and German elements in the metropolis. This law has long been a dead letter, yet those desiring to disregard it have often feared its ghost, for its spirit has occasionally come back to earth, when some city guardian was enraged because his fee was not sufficiently large to induce him to wink at the desired infringement.

—THE principles of lynch law are in the creed of civilized, as well as uncivilized, Americans. The *New York Herald* thinks the proper treatment of that Turkey which the potentates of Europe are trying to madden into showing fight, by waiving at it the red flannel of imaginary war, is to wring its head off. The *Herald* refers with approval to that "far-sighted person who, to prevent hydrophobia in a dog by cutting off a piece of his tail, made the cut immediately behind the dog's ears."

—THE lawyers of Nebraska have formed a State Bar Association. At a meeting held in Lincoln, January 8th, the constitution and by-laws were adopted, which were signed by thirty of the fraternity then present. Article I. of the constitution states the purposes as follows: "The Association is established to maintain a high standard of professional integrity among the members of the Nebraska bar, to cultivate social intercourse and courtesy among them; to encourage a thorough and liberal legal education, and to assist in the improvement of the law and the due administration of justice to all classes of society, without distinction." S. H. Calhoun, Esq., of Otoe, is president, and D. G. Hill, we presume of Lincoln, corresponding and recording secretary.

—WE learn that what we said about "collection agencies" in our issue of January 7, has been construed by some as reflecting upon the enterprise of Solon W. Paul, Esq., of this city. A careful reading of it, however, will show that we did not intend to reflect, but the reverse. What little we knew and know about Mr. Paul's enterprise is in its favor. Such of the firms on the lists of attorneys recommended by him as are known to us are good men, and we have received no intimation from any quarter against his particular enterprise. The remarks of the correspondent whose letter we quoted were directed, not against Mr. Paul, but against the legal directory men generally. Persons who get up these advertising lists have every motive to exclude disreputable attorneys from them, and the value of their lists is in direct proportion to the diligence and caution with which they revise them and keep irresponsible names weeded out.

—THE WHISKY RING ALPHABET.

A—stands for Avery, clerk of the ring;
B—for Babcock, who had a big thing;
C—is for Conduce, otherwise named Megrue;
D—is for Dyer, who made them feel blue;
E—is for Everest, gone to the South;
F—for Fitzroy, who talks with his mouth;
G—is for Grant, whose pardon they crave;
H—for Henderson, gone to his grave;
I—for Int. Rev., which is hard to collect;
J—is for Joyce, who has time to reflect;
K—is for Keno, on which they all bet;
L—stands for Liars, unpunished as yet;
M—for the Mischief they try to keep Mum;
N—for the nuisance the ring has become;
O—stands for Orville, who won't be put through;
P—is for Peddrick, Penitentiary too;
Q—the whole business, decidedly queer;
R—Rectifiers, who hope to get clear;
S—stands for St. Louis, where the ring came to grief;
T—is for Treat, of all just judges the chief;
U—is Uncle Sam, whose anger is hot;
V—is the Virtue the ring hasn't got;
W—is Whisky, of corn or of rye;
X—is the cross on which thieves ought to die;
Y—stands for Yaryan, last but not vile;
Z—for the zebra whose stripes are the style.

—St. Louis Times.

—MR. OAKLEY HALL, has decided that, after all, law is his forte. Having spent six weeks in vacation, in which time he found himself unequal to the task of being playwright, manager, proprietor, scene-shifter and star-actor, he returns to his earlier love. "He will hereafter confine himself as ADVOCATE to the following specialties: Cases connected with Criminal Law, Personal Remedies, Libel Defences, Actions against Sheriffs and Marshals, Copyright and Theatrical Law, Surrogate Procedure and Municipal matters. He will, also, as COUNSEL, especially take charge of questions affected by Commercial Fraud, Police Investigations, Attempts at Social Extortion, or which require Diplomatic Negotiation." The stage that mourned his coming is, however, determined to appropriately celebrate his departure, and a grand benefit is promised him at Booth's theater. In making his farewell speech at the Park theater Mr. Hall said: "The physicians say that I must leave the practice of the law; but my clients say 'no' and they disturb me at all hours at my house, and crowd about me at the theater, and leave their papers at the box office. When I abandoned the practice of the law for the stage, there were those who had never acknowledged that I could manage anything properly, who turned about and called me an excellent lawyer. They were like those who, after a man is dead and under the sod, say that he was virtuous from his cradle up. Now, it is said that a man ought to die in the harness, and it has seemed to me that I should murder myself in the old profession, than commit manslaughter in a new one, or, rather, man's laughter at my feeble efforts in the direction of dramatic art."